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The Boundaries of Contract Law in
Cyberspace

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Leon Trakman


Abstract

This article evaluates the extent to which the traditional policy of deterrence that regulators and courts historically applied to so-called adhesion contracts are extended to “new” classes of 21st century cyber-consumers in our consumer-centric era. Concentrating on the law of unconscionability in jurisdictions like California and New York, it considers how courts treat cyber-consumers who resell goods and services, engage in repeat order transactions, and exercise market choice. Exploring the judicial treatment of unconscionability in box-wrap, shrink-wrap, click-wrap¹⁷ and browse-wrap¹⁸ contracts, not limited to cyber-commerce, it explores judicial conceptions of “bargaining naughtiness” leading to procedural unconscionable, and “evils lurking” in “wrap” contracts giving rise to substantive unconscionability. It juxtaposes the view that “wrap” producers purposefully deny cyber-consumers the opportunity to review onerous conditions against the reality that many consumers choose not to read the fine print because it is uneconomic for them to do so.

COMMENT COLUMN

The Boundaries of Contract Law in Cyberspace

Leon E. TRAKMAN*

 Click-wrap agreements; Consumer protection; Contract terms; Electronic contracts; Formation of contract; Licensing agreements; Online services; Shrink-wrap licences

INTRODUCTION

Fifteen years after American courts first began considering whether shrink-wrap software licenses¹ are enforceable, the law governing shrink-wrap,² box-wrap³ and now click-wrap⁴ and browse-wrap⁵ remains uncertain. At one extreme, courts consider whether to protect consumers from powerful suppliers that package onerous conditions in shrink-wrap or box-wrap, or require online customers to click “I agree” to onerous conditions in click-wrap contracts, or direct consumers by hyperlink to onerous conditions in browse-wrap contracts. At the other extreme, courts evaluate whether to enforce software and computer contracts and internet licenses to protect the commercial interests of producers and distributors from the demands of new kinds of cyber-consumers who are allegedly market savvy and adept in mass purchasing. The problem for legislatures and courts is to

determine whether “wrap” contracts in general or sub-sets of them in cyber-contracting are sufficiently distinctive to receive special treatment in law. A related issue for law reformers and judges alike is how to carve a viable pathway between principles of practice by which to govern our fastest growing global e-commerce industries, while continuing to apply the relevant code and common law of contracts.⁶

The history of Art.2 of the Uniform Commercial Code (UCC) displays pervasive policy tensions.⁷ One tension is between facilitating e-commerce in a free market and a code that protects consumer interests from the predatory practices of large scale online producers of goods and services.⁸ A related tension revolves around the regulatory role of Art.2 of the Code,⁹ notably in relation to unconscionable contracts under Art.2-302 in general and including cyber-contracts.¹⁰ These tensions arise in the judicial treatment of end user contracts, notably End Users Licensing Agreements (EULAs).¹¹

At issue, too, is the extent to which law reform agencies and courts, over time, will erode the common law principles of offer and acceptance in regulating a growing spectrum of “wrap” and related rolling transactions in cyberspace.¹² If the Uniform Computer Information Transaction Act (UCITA) is any guide, a further issue will revolve around how effectively they do so in fact.¹³

This article evaluates the extent to which the traditional policy of deterrence that regulators and courts historically applied to so-

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called adhesion contracts are extended to “new” classes of 21st century cyber-consumers in our consumer-centric era.¹⁴ Concentrating on the law of unconscionability in jurisdictions like California and New York, it considers how courts treat cyber-consumers who resell goods and services, engage in repeat order transactions, and exercise market choice.¹⁵ Exploring the judicial treatment of unconscionability in box-wrap, shrink-wrap,¹⁶ click-wrap¹⁷ and browse-wrap¹⁸ contracts, not limited to cyber-commerce, it explores judicial conceptions of “bargaining naughtiness” leading to procedural unconscionable,¹⁹ and “evils lurking” in “wrap” contracts giving rise to substantive unconscionability.²⁰ It juxtaposes the view that “wrap” producers purposefully deny cyber-consumers the opportunity to review onerous conditions against the reality that many consumers choose not to read the fine print because it is uneconomic for them to do so.

The article concludes that “wrap” contracts used in cyberspace ought to be governed primarily by the ordinary principles of offer and acceptance. “Wrap” contracts are insufficiently different from other forms of rolling contracts to warrant distinctive treatment.²¹ With the possible exception of browse-wrap contracts, disputes over conditions in “wrap” contracts should be resolved without carving out new remedies devoted specifically to e-commerce. Nor are new classes of mass online consumers sufficiently different from offline consumers of the past to warrant special rules to protect or govern them.²²

What is distinctive today is growing concern about the use and abuse of e-commerce. Regulating e-commerce competes with preserving a free market in goods and services. Treating e-purchasers equitably competes with encouraging free competition in supply and demand. What is also distinctive today is the reluctance of legislatures to regulate e-commerce, and the extent to which courts must bear that burden by legislative default.²³

THE ADHESION CONTRACT

When should e-suppliers be mandated to provide cyber-customers with advance notice of an intention to limit supplier liability or impose additional liability on e-purchasers in shrink-wrap,

box-wrap, click-wrap or browse-wrap contracts?²⁴ Ought e-suppliers to explain those conditions to cyber-customers in advance of entering into contracts with them? Should an e-supplier be able to impose additional conditions on a consumer after acceptance of the offer? And under what conditions ought end-users to be bound to such conditions? These and other questions arise in relation to so called adhesion contracts, defined in *Comb v PayPal, Inc*²⁵ as a standardised contract drafted by the party with superior bargaining power and forcing the subscribing party to either adhere to or reject the contract.²⁶

In a legal tradition initiated by Edwin Patterson in 1919²⁷ and expounded upon by Frederick Kessler in 1943,²⁸ boilerplate “adhesion contracts” have sometimes been construed in favour of the weaker bargaining party.²⁹ As Karl Llewellyn, legal realist and primary drafter of Art.2 of the UCC stated:

“Instead of thinking about ‘assent’ to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all.”³⁰

The result has been that courts sometimes declined to enforce unfair contracts; they severed unfair clauses from them, and they construed onerous clauses within them in favour of customers.³¹

Far from regularly striking down contracts for unconscionability, courts voided or restrictively construed contracts only in discrete industries such as insurance contracts, termination at will franchise contracts and mass supply contracts that excluded class actions and mandated arbitration.³²

The perceived malady associated with such one-sided contract in the early 20th century was that they were drafted by parties with superior bargaining power that dictated one-sided take-it-or-leave-it contracts to patently inferior bargaining parties.³³ The alleged harm lay in the potential abuse by powerful parties like mass insurers and employers of their monopolistic and oligopolistic command and in complex standard form contracts they imposed on captive audiences of customers and employees.³⁴ As was stated in the Restatement (Second) of Contracts:



"A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms."³⁵

Far from regularly striking down contracts for unconscionability, the response to such boilerplate contracts was for courts to remedy imbalances in bargaining power, but without trampling freedom of contract itself.³⁶ The purpose was to ensure that, if conditions in boilerplate consumer contracts were unduly harsh, oppressive, or unconscionable, courts would strike them down or construe them restrictively, but without regressing into unbridled paternalism.³⁷ If the contract was capable of different constructions, it should be construed *contra proferentum*, namely, against the drafter and in favour of the weaker party, so long as it did not shelter those who failed unreasonably to shield themselves.³⁸

The law of unconscionability provided courts with some leeway in limiting the impact of standard form contracts adjudged to be procedurally or substantively unconscionable, or both.³⁹ The guiding approach was for courts to redress the inequity arising from unfair bargains while accepting that cyber-consumers are rational actors.⁴⁰ The operative directive was for judges to apply a property rule that denied effect to onerous contract conditions, as distinct from a liability rule that led to damages.⁴¹ Their purpose was to arrive at efficacious results that were also principled.⁴²

The backdrop behind the judicial construction of consumer contracts lay in the principle of mutual assent in the formation of a contract, not in the paternalistic construction of assent.⁴³ Courts presumably were responsible to redress the lack of mutual assent arising from the inability of consumers reasonably to influence the terms of "their" contracts.⁴⁴ The guiding rationale was for courts to proffer rules of interpretation to regulate bullet-proof contracts, not limited to those imposed on consumers.⁴⁵ The anticipated result was to democratise the process of contracting in the interests of fairness between the parties. As John Murray once proclaimed:

"This process does not deserve to be called contractual. It is not democratic and, in a

society based on mass production which requires standardized forms even among competitors, it is essentially unfair."⁴⁶

The result was that courts either voided contracts or construed them restrictively on grounds that the dominant party had unduly misled the subservient party into contracting.⁴⁷ The judicial analysis leading to this result lay in scrutiny of the complexity, size, location and number of onerous conditions in such contracts, the nature of the duties they imposed on the subservient party, the manner in which that party was induced into contracting, and the extent to which the results were unfair, and sometimes inefficient.⁴⁸

In response to the argument that boilerplate contracts reduced transaction costs for both suppliers and consumers, there was concern that consumers were often misled into believing that the benefits of such transactions, notably lower prices, outweighed their costs.⁴⁹ Some warned that more disclosure by suppliers prior to sale, far from better informing consumers, overloaded them with information and provided suppliers with disclosure shields against procedural unconscionability.⁵⁰ Behavioural psychologists hinted that mass consumers tended to make irrational choices, such as by accepting onerous conditions in return for negligible reductions in price.⁵¹ Some warned that mandatory judicial regulation of such contracts was necessary in order to impede suppliers from exploiting consumer irrationality.⁵²

The 21st century consumer

The prototype early-20th century "victim" of such irrational contracting was the purchaser of general insurance who lacked the capacity to understand the nature of fine print clauses, the ability to bargain over them and to avoid the economic hardship of acceding to them.⁵³

Twenty-first century jurisprudence, at least on the margins, has cast some doubt on this restrictive image of the consumer and the boilerplate contracts.⁵⁴ In a post-modern era of instantaneous contracting and cyber-commerce,⁵⁵ the image of the dominant insurer that imposed its will on the irrational insured is less self-evident today than it was for Edwin Patterson



in 1919.⁵⁶ In an information age of informed cyber-purchasers, consumers are more product-aware, have greater access to reliable product data in making rational purchasing decisions, enjoy a wider choice among goods and service and display greater willingness to resolve disputes in cyberspace.⁵⁷ E-consumers are also better able to induce mass suppliers to improve goods and services in competitive supply markets not limited to insurance.⁵⁸

The cyber-market is also perceived as being both rational and demand savvy.⁵⁹ If a significant number of consumers prefer lower prices to onerous contractual conditions, suppliers will satisfy that demand by competing on price. If some consumers prefer favourable contract conditions to lower prices, suppliers will modify their behaviour to accommodate that demand, failing which new suppliers will enter the market in order to satisfy that consumer niche.⁶⁰ If purchasers have worthy concerns, suppliers will satisfy those while resisting others purchasers who lodge overblown complaints.⁶¹

The advent of the 21st century has also produced the vision of an efficient cyber-consumer who is more closely identified with an efficient merchant.⁶² Mass purchasers not only purchase online on the basis of price, quality and supplier reputation. Acting *en masse*, they require suppliers to satisfy their distinctive demand.⁶³ "If enough consumers comparison shop to make it profitable for firms to compete on price and quality, firms also are likely to compete on terms."⁶⁴

According to this rationale, the so called "unbargained" contract is truly a two-sided deal that favours both parties, not only the supplier.⁶⁵ Boilerplate terms are simply a bargaining tool that signals to both parties those terms that are non-negotiable.⁶⁶ Market conscious consumers make the informed choice not to study fine print clauses because of the transaction cost of doing so, coupled with the low probability that such knowledge will subsequently be required.⁶⁷ Not dicker over terms makes both selling and buying cheaper.⁶⁸ Mass suppliers draft standardised conditions in mass markets that discourage bargaining for mutual benefit; and suppliers that act solely in their own interests risk losing market and price-sensitive purchasers to competing suppliers.⁶⁹ Absent income effects and

transaction costs, consumers gain more strategic advantage in not engaging in the process of bargaining, choosing instead to focus on price, quality of service and competition than on the fine print.⁷⁰

At their most aggressive, e-purchasers can secure concessions from mass suppliers by threatening adverse publicity, inciting copycat behaviour by other consumers, or organising consumer boycotts or mass litigation.⁷¹ The presumed result is that e-suppliers, faced with increased transaction costs, may either agree not to enforce onerous contractual conditions against aggressive customers while enforcing them on all others, or discarding those onerous conditions where the threat of adverse publicity outweighs the economic benefit of retaining such conditions.⁷²

As in all things, there is a grain of truth to the new-found market power of cyber-consumers. Some consumers may well be more discriminating in choosing among suppliers than consumers were in decades past.⁷³ Some may act efficiently in accepting standardised conditions that are one-sided in return for lower prices,⁷⁴ or in accepting higher prices to secure extended warranty services.⁷⁵ Some may "bribe" suppliers into reducing prices, opportunistic in outwitting sales agents into sacrificing commissions and tenacious in demanding lower prices, better products, superior warranties, or preferred delivery terms.⁷⁶ Most will click "I agree" because they do not care to study the fine terms surrounding that upon which they have agreed.⁷⁷

One should nevertheless not overstate these new-found powers of consumers. Time has not stood still for mass suppliers either. Not only have cyber-suppliers, among others, devised standardised form contracts in their favour. They have taken full advantage of cyber-purchasing patterns brought about by instantaneous communications in mass markets, including by misinforming purchasers.⁷⁸ They have developed inventive ways of imposing onerous conditions after purchasers have accepted offers and by restricting the rights of those purchasers, such as to resell, beyond the life of the immediate transaction.⁷⁹ Mass suppliers have also devised self-serving ways in which to detect and service aggressive purchasers, continuing to impose harsh conditions on others who remain



compliant.⁸⁰ In effect, mass suppliers have consolidated their power in new mass markets, not forsaken it.⁸¹

The issue, now, is to consider the extent to which cyber-consumers constitute a new market force and if so, whether that new force justifies rethinking traditional principles of contract formation.

Repeat-order consumers

Repeat-order consumers order products like computers or software goods by telephone or online in mass markets over a sustained period of time. Possessing market choice, they are often familiar with the price, product and reputation of the supplier, but generally less familiar as a class with contract conditions. Some may tolerate onerous conditions in "wrap" contracts in order to pay less, not unlike in product liability cases. Others that favour product quality and service over price may be more cognisant of contract conditions that restrict supplier warranties.⁸² A few repeat order customers may have studied applicable contract conditions, have access to informed legal advice and even be lawyers themselves.⁸³

Still, there is nothing distinctive about the marketing background of repeat-order consumers who buy online. The presence of customers who purchase products continuously, shop for price, learn about supplier reputation, and appreciate product attributes well precedes the internet revolution.⁸⁴

Consumer-resellers

Consumer-resellers, as the name implies, purchase goods and services primarily in order to resell them to other consumers. Illustrating this class, are consumer-resellers who purchase domain names for resale. For example, in *DeJohn v TV Corp International*,⁸⁵ the plaintiff claimed that TV Corporation had violated the Illinois Consumer Fraud and Deceptive Practices Act in declining to permit him to register a domain name. In rejecting DeJohn's claim, the court held that, in intending to purchase domain names for resale, DeJohn was not a "consumer" protected by

that statute. Instead DeJohn was treated like a merchant.⁸⁶

An insidious illustration of a consumer-reseller is the cybersquatter. A cybersquatter purchases online one or more domain names that are "confusingly similar" to a famous name in order to direct online traffic away from the famous name to alternative websites for profit, or to resell those names to the famous names that they target.⁸⁷

Cybersquatters are certainly not a pervasive class of consumers; but they do illustrate adventitious consumer who, for a small outlay to purchase a domain name, exploit the cyberspace market sometimes to their significant economic gain. At the same time, despite policy concerns over the damage cybersquatters can cause to the reputation of established companies, the presence of adventitious consumers who purchase goods and services for illicit use, including securing concessions from manufacturers, well precedes the advent of cyber-squatters.⁸⁸

What makes cybersquatters distinctive is the fact that ordinary principles of offer and acceptance in contract do not readily apply to them as a class. Given their disparate global locations and the impracticality of proceeding against them and securing enforceable judgments before national courts of law, distinctive policies and rules have developed to regulate them. The result has been an international overlay of domain name regulation, notably by the World Intellectual Property Association (WIPO), that delineates when the purchase of a domain name is illegal and when its acquisition or use is in bad faith.⁸⁹

What also makes this class distinctive is that cybersquatters usually know that, should those domain names be cancelled or transferred, they can purchase substitute names at a limited cost and repeat their practices.⁹⁰ Still, only a small sub-class of consumers profit from the practice of cybersquatting.⁹¹

A key issue, now, is to determine the extent to which cases involving new classes of consumers can be decided on the basis of established principles of offer and acceptance in contract.



THE 21ST CENTURY “WRAP” CONSUMER

Some generalisations are now in order. Twenty-first century consumers include those who conclude shrink-wrap, box-wrap, click-wrap and browse-wrap contracts with large scale producers and distributors with varying degrees of regularity. The conditions contained in applicable “wrap” contracts of supply and service in general are often detailed, syntactically complex and favour the superior drafting supplier.⁹² The “wrap” consumer is often subject to a take-it-or-leave-it option: either to agree to the onerous conditions or decline to contract.⁹³ In extreme forms, these contracts include “whole agreement” clauses by which the contract purports to exclude extrinsic evidence in interpreting the contract.⁹⁴ The implicit purpose of such clauses is to impede a finding that a condition is ambiguous, or that it should be interpreted in light of standards of reasonableness that are extraneous to the contract.⁹⁵ While “wrap” contracts that set out their own rules of interpretation can provide greater certainty and predictability to the parties, that practice is less plausible when rules of interpretation are directed at impeding judicial scrutiny.⁹⁶

The contract practices of 21st century mass consumers, not limited to cyber-consumers, are also not distinctive. As before, most “wrap” consumers still do not scrutinise supply driven conditions in “wrap” contract. Either such clauses are too complex for them to understand, or the cost of doing so outweighs the perceived benefit. Consumers may not inform themselves for rational reasons. “[I]t [is] clear that in some cases, paradoxically, it would be irrational to become fully informed.”⁹⁷ Suppliers, in turn, may take full advantage of this “non-practice” of consumers by including ever more self-serving clauses in their “wrap” contracts.

The existence of new classes of consumer-resellers in itself does not infer that “wrap” consumers are equipped to outmanoeuvre their mass suppliers. Some classes of mass consumers may take advantage of the vulnerabilities of large-scale producers that have intellectual property to protect, deep pockets and reputations at risk.⁹⁸ Some consumers may exploit their fellow consumers, such as by trafficking in on-line gambling and pornography.⁹⁹ The reality is

that most online consumers lack the resources, know-how and confidence to stand off against large-scale producers. Nor are mass consumers generally equipped to use online networking to trade in information on securing an advantage over online suppliers.¹⁰⁰

One might ask now, what is distinctive, if anything, about 21st century “wrap” contracts not limited to those used in cyberspace; and how should courts construe that distinctiveness? These questions are considered, first, in relation to new classes of consumers and then more generally.

Repeat-order consumers

Repeat-order cyber-consumers buy and sell goods and services regularly on line, in addition to those who do so by phone or other means of direct buying. Most have market choice, choose among competing off- or online suppliers on the basis of quality, price and in some cases, conditions of service. Some may be familiar with take-it-or-leave-it conditions in shrink-wrap, box-wrap, click-wrap and browse-wrap, but few will have detailed comprehension of the contractual and legal implications arising from these conditions.¹⁰¹

Consumer-resellers

Some “wrap” customers buy products like software on and off-line to resell to third parties.¹⁰² The predominant issue is whether supplier driven conditions on use and resale are enforceable against these consumer-resellers. A further issue is whether courts conceive of these purchasers as consumers, or as de facto merchants who ought not to benefit from the judicial construction of “wrap” contracts in their favour.¹⁰³ As an illustration, in the shrink-wrap case of *ProCD, Inc v Zeidenberg*¹⁰⁴ the court concluded that Matt Zeidenberg, in purchasing a CD online which he resold to his own customers was not a consumer.¹⁰⁵ It held further that he was bound by the shrink-wrap condition that restricted his right to resell.¹⁰⁶



Consumers with market choice

A third overlapping consumer class includes those with market choice. Illustrating this class of consumers in telephone and mail order sales is *Brower v Gateway*.¹⁰⁷ On its face, Gateway's shrink-wrap contract to sell computers and software by telephone or mail directly to customers was one-sided: Gateway's customers did not have equal bargaining power to Gateway. The court nevertheless concluded that the contract, including its disputed mandatory arbitration clause, did not constitute an onerous take-it-or-leave-it option. Firstly, the contract gave plaintiffs an "unqualified right" within 30 days of date the purchase, "to return the merchandise, because the goods or terms are unsatisfactory or for no reason at all."¹⁰⁸

Secondly, plaintiffs could purchase comparable goods from other suppliers. The court acknowledged that doing so required plaintiffs to act affirmatively and involved additional cost; but the tradeoff of buying by telephone and mail was justified by "the convenience and savings" of direct shopping.¹⁰⁹

These judicial statements presuppose that consumer choice in mass "wrap" contracting is real, not feigned. For example, the right of consumers to return products within 30 days of purchase would be a less self-evident market choice should the return clause be buried among a plethora of legal provisions at the back of the owners' manual and not otherwise highlighted for the consumer.¹¹⁰

Simplified conditions

A final category of "new" mass consumer contracts includes those in which defects or vices in mutual assent are deemed to be absent from the contract. These cases are decided on the basis of traditional principles of offer and acceptance. Typically, the disputed supply contract is expressed in simple language and its conditions are explained to customers before finalising the contract. One could argue that *Brower v Gateway*, involving the right of consumers to return goods, was so tailored to customer needs.

"Mass producers and distributors that use simplified conditions ordinarily do not forego

their bargaining power. In providing customers with the opportunity to review 'wrap' conditions and to void contracts within an allowable period, they choose rather to enhance their reputations for fair dealing while also discouraging adventitious suit against them."¹¹¹

Expressed in terms of offer and acceptance, both parties were *ad idem*; both seriously intended to contract; and the buyer accepted the seller's conditional offer.¹¹² Conditions in the contract were not unconscionable because the customer was provided with due notice of those clauses as well as the opportunity not to contract on account of them. As the court held in enforcing AOL's click-wrap license in *Groff v America Online, Inc*¹¹³:

"[P]laintiff effectively 'signed' the agreement by clicking 'I agree' not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement."¹¹⁴

The contractual issue is not that customers have not read onerous conditions in such contracts, nor even whether or not they have understood them. The issue is whether suppliers have provided customers with notice of those conditions. Whether or not a prospective purchaser acts on that notice is for that purchaser to decide and goes to motive in contracting, not intention.¹¹⁵ Nor can that purchaser subsequently invoke inaction as a ground for allegedly not having accepted the supplier's conditional offer. As was stated in *Brower v Gateway 2000 Inc*:

"That a consumer does not read the agreement or thereafter claims he or she failed to understand or appreciate some term therein does not invalidate the contract any more than such claim would undo a contract formed under other circumstances."¹¹⁶

There is nothing remarkable in the observation that judges construe "wrap" contracts in accordance with whether the parties have a serious intention to contract, as distinct from their motive in contracting.¹¹⁷ Nor can one reasonably object



to courts deciding on the basis of objective evidence whether mass purchasers have assented to material terms in their contracts.¹¹⁸ Nor, too, can one fairly object to judges examining the size and location of fine print conditions, the extent to which they are properly explained to purchasers and whether purchasers are given due notice of them prior to contracting as well as a reasonable opportunity to withdraw from the contract.¹¹⁹

What can be questioned is the manner in which courts ought to determine whether purchasers have seriously intended to contract and assent to supplier driven conditions in “wrap” contracts. An in principle objection is whether suppliers should be free to invoke oppressive conditions on grounds that they gave their customers sufficient opportunity to consider whether or not to accept those conditions.¹²⁰ Of concern, too, is whether customers should be held to have accepted onerous conditions in offers only after becoming so aware on taking delivery, opening a shrink-wrap or box-wrap, or accessing a browser through a hyperlink.

These concerns are not peculiar to “wrap” contracts, nor even to e-commerce. But they arise with greater frequency in such contracts. They raise questions about the capacity of the law governing offer and acceptance to regulate “wrap” contracts in which purchaser assent is, at best, strained.¹²¹ They also bring into focus whether customers have accepted conditions according to which they are deemed to have waived their rights to sue on the contract,¹²² or to enforce pre-existing statutory entitlements.¹²³

CHALLENGING THE NEW ORTHODOXY

The old orthodoxy holds that most consumers are unaware of the intricate terms in standard form contracts because suppliers do not wish them to become so aware, because the cost to consumers acquiring such information is exorbitant and because suppliers create barriers to customers acquiring it.¹²⁴ Even when suppliers do not erect barriers to customers acquiring such information, as the late Arthur Allen Leff would have it:

“[m]any people don’t read contracts at all.
... Some people would sign a contract even

if ‘THIS IS A SWINDLE’ were embossed across its top in electric pink.”¹²⁵

For some, the world has not changed at all and the old orthodoxy persists today. Large-scale producers of software and computer products and online service providers still operate largely as oligopolies. They sell goods and services within markets that, as in years past, are inhabited by traditional consumers—moms and dads, teenagers, office workers and students. Even the simplified language in some software and service licenses reflect not the mass suppliers’ awakened appreciation of consumer power but the suppliers’ calculated design to insulate themselves from costly disputes.¹²⁶ From software manufacturers to sellers of mobile phones, mass suppliers carve out exclusion and limitation of liability clauses specifically to minimise unexpected losses and to maximise on profits.¹²⁷ However seemingly simplified their contracts may be, they stipulate for binding arbitration and against class actions to discourage consumers from suing and to provide for dispute resolution in their familiar home jurisdictions. Their goal is assuredly not to establish a consumer friendly, or even a mutually convenient forum in which to redress consumer disquiet.¹²⁸ They play the odds that most consumers will not complain and yet fewer will take legal action.¹²⁹ As was stated in the recent case of *Gatton v T-Mobile USA Inc*¹³⁰: “subscriber [consumer] claims involved individual damages as small as \$200, making a class action the only practicable way for subscribers to seek redress...”.¹³¹

Those who adopt this view treat the consumer contract as they did a century ago, as a take-it-or-leave-it affair.¹³² In advertising the just-a-click-away-deal, computer and software sellers and online service providers maximise upon sales and increase profit margins while continuing to provide consumers with little in return. Cyber-consumers who read contracts and ask questions slow down sales. They also invite argument over terms that disturb the smooth running of the supplier’s business.¹³³

The boilerplate cyber-contract is the effective means by which mass e-suppliers induce customers to accept conditional offers. Customers sacrifice the “give and take” of bargaining over contract terms conceivably in being denied the



opportunity to cast their mind upon the matter.¹³⁴ Whether or not mass producers provide sufficient advance notice of conditions in software and service licences and whether or not courts are willing to void such harsh conditions, the contracts of software producers and online service providers remain one sided, “their” sided. However sophisticated repeat order consumers may have become, most avoid challenging mass online suppliers who dominate the world of artificial intelligence and cyberspace.¹³⁵

That customers do not bargain over terms they do not understand further empowers suppliers to “legislate” oppressive terms.¹³⁶ That consumer-resellers and repeat order consumers choose not to read boilerplate contracts is offset by the realisation that suppliers devise barriers to them reading them, including access only after the contract has been concluded.¹³⁷ That the disquiet of consumers is dissipated by new producers who enter the market to satiate new demand ignores the extent to which producers erect forbidding barriers to exclude new competition.¹³⁸ That customers accept onerous conditions in return for lower prices is offset by the realisation that lower price is often deficient compared to stringent conditions which suppliers impose on customers *en masse*.¹³⁹

A problem with 21st century conceptions of supplier-consumer relationships is that they are based on stereotypes, as well as conflicting argument. Each stereotype has a counterpoint. Dominant suppliers can be depicted as relentlessly pursuing profit at the expense of cyber-consumers. So too can teenage consumers be depicted as potential spammers, poised to download music and movies in violation of the supplier’s hard-earned copyright.¹⁴⁰ Boilerplate contracts may include anti-competitive and mandatory conditions that are reinforced by drafter misrepresentation.¹⁴¹ Boilerplate contracts can also help to reduce transaction costs to the benefit of both parties.

If anything, cyber-contracting has changed the world of business by increments. Mass online consumers on average are better educated and have access to more information than consumers did a century ago; but today’s consumers are also bombarded with more complex information about products and services than consumers were a century ago. Consumer goods

today cost a fraction of a consumer’s monthly wage compared to bygone times; but producers of consumer goods on average sell far more goods to far more consumers than their predecessors did in bygone times. Information age producers may be better informed about unrequited consumer demand than in the past; but they face more formidable barriers to entry and greater economies of scale in gaining market access than in that past.

REGULATING MASS CONTRACTS

Whether or not courts accept the old orthodoxy, that mass suppliers position themselves to abuse adhesion contracts, judges still face difficult questions in specific cases. If large scale producers impose self-serving conditions in “wrap” contracts on cyber-consumers, how should judges apply rules of construction that restrict the application of those conditions without stultifying the free exchange of goods and services in cyberspace? If judges endorse a newer orthodoxy in which mass consumers are better able to command their own destiny, they must still establish criteria by which to differentiate among kinds of consumers in changing mass markets, not limited to cyber-consumers.¹⁴² They must also establish a principled basis upon which to ground their determinations.

Enter Judge Easterbrook

In 1996, Judge Frank H. Easterbrook, a one-time influential law professor and now even more influential judge,¹⁴³ decided that a CD producer could use an end-user licensing agreement (EULA) to restrict a purchaser’s use of a copyrighted CD. In *ProCD, Inc v Zeidenberg*,¹⁴⁴ Easterbrook ruled that Mathew Zeidenberg, in opening a CD package assented to the shrink-wrap conditions prohibiting copying the data for resale. Judge Easterbrook’s reasoning was grounded in the flip side of the principle of freedom of contract. Just as parties are autonomous in deciding with whom to contract, they are bound by that to which they agreed: *pacta sunt servanda*, agreements are binding.¹⁴⁵ By purchasing a CD subject to a condition to which he agreed, Zeidenberg was bound by the licence restrictions governing the use of data on that CD.¹⁴⁶



At a rudimentary level, Judge Easterbrook's decision applies the traditional rules of offer and acceptance to a shrink-wrap contract. *ProCD* offered Zeidenberg a product subject to a condition which Zeidenberg accepted; Zeidenberg was bound. In accepting *ProCD*'s offer, Zeidenberg accepted all conditions that the supplier managed to bundle into that offer.¹⁴⁷ For Easterbrook, the sale took place in a competitive market in which judicial intervention on behalf of the purchaser-consumer was ill-advised: "Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy."¹⁴⁸

Judge Easterbrook nevertheless did not depict Zeidenberg as an "ordinary" consumer, entitled to protection as a consumer. Instead, he declared that UCC § 2-207 (battle of the forms provision) was "irrelevant."¹⁴⁹ Had he applied § 2-207, the additional condition restricting copying the CD for resale would have been unenforceable, and Zeidenberg would not have been bound by a condition to which he had not assented.

Treating the case as an ordinary commercial sale, Judge Easterbrook noted that, under UCC § 2-204, "[a] contract for the sale of goods may be made in any manner sufficient to show agreement . . .".¹⁵⁰ Easterbrook did not canvass whether the transaction fitted the UCC's definition of "agreement" in § 1-201(3) as "the bargain of the parties in fact."¹⁵¹ Nor did he endorse the District Court's unqualified rejection of *ProCD*'s argument that copying a CD including non-copyrightable data constituted copyright infringement.¹⁵² Most importantly, Easterbrook ignored material attributes of unconscionability in the transaction. Zeidenberg was not reasonably aware of the onerous condition when he accepted the offer; that condition was profoundly restrictive in nature; and it was printed in minute font on the bottom flap of the box.¹⁵³

Instead Judge Easterbrook depicted Zeidenberg as an intelligent buyer, a PhD student with a database of his own customers. In doing so, he conflated Zeidenberg's supposed market knowledge with contractual know-how that Zeidenberg clearly did not have. Easterbrook also passed over the complex nature of shrink-wrap contracts in which *Pro-CD* was a sophisticated player while Zeidenberg was not.¹⁵⁴

Some tentative conclusions

On a superficial level, *ProCD v Zeidenberg* presents the new orthodoxy in which 21st century consumers are more discriminating, discerning and better educated than in past eras.¹⁵⁵ In support of his reconstruction is the emerging sophistication of cyberspace consumer-resellers who glean information about software products and internet services from the internet¹⁵⁶ and who exchange know how and complaints about products and services on online notice boards and in chat-rooms.¹⁵⁷

On a fundamental level, the reasoning extends assent to purchase into assent to additional conditions in the absence of additional assent. It also transforms the market sophistication of consumers like Zeidenberg into contractual sophistication, and their reselling practices into mercantile expertise. At stake is the transformation of consumers from neophytes into sophisticated contractors in the absence of middle ground between the two.¹⁵⁸

Economic rationalists may defend *Pro-CD v Zeidenberg* as being less about disciplining Zeidenberg for acting as a consumer-reseller than reducing *Pro-CD*'s costs and increasing its returns on sales. Optimists may hope that suppliers like *Pro-CD* will pass IP benefits onto customers by offering them more comprehensive databases at more affordable prices.¹⁵⁹ These expectations are at best, conjectural. Companies like *Pro-CD* may well do the opposite: maintain or even raise prices in order to raise profits. Skeptics may worry that suppliers, armed with such victories, may over-reach as private "legislatures". They may rely on courts to apply principles of mutual consent to contracts in which the assent of consumers to onerous conditions is more contrived than genuine.¹⁶⁰

A macro-economic hazard is not simply that the perceived demand for market competition might dwarf concerns about unfair competition. The hazard is in reinforcing contractual practices by which oligopolies affirm their domination over mass markets not limited to the internet.¹⁶¹ The risk is that what commences as a marginal ill may regress into a replicated malady in which "[c]ompetitive pressure . . . works to compel every producer to make its contracts at least as unfair as the contracts of the other members of its industry."¹⁶²



The legal peril is that, in affirming that freedom of contract embodies the voluntary exchange of goods and services, judges may refuse to recognise that contract law is also about regulating transactions in which assent of one party to onerous conditions is absent and therefore not voluntarily given.¹⁶³

A saving grace in all this is that some courts may distance themselves from cases like *ProCD v Zeidenberg*.¹⁶⁴ Judges may decline to enforce conditions in end-user licenses that serve as covers for product malfunctioning, not testaments to the mutual assent of the parties.¹⁶⁵ Scholars may demonstrate the extent to which purchasers like Zeidenberg did not assent to conditions about which they are not reasonably aware when they entered into contracts of purchase and sale.¹⁶⁶

ENTER THE DRAGON: END USERS' LICENCE AGREEMENT

The analysis thus far has concentrated on the general legal nature of 21st century consumers and contracts. What follows is an examination of the form and substance of "wrap" contracts, the conditions they contain, how they are communicated to customers and the legal effect which courts attribute to them.

The End Users' Licence Agreement [EULA]

The modern End Users' Licence Agreement [EULA] is widely used by producers and distributors to grant licences to end users of software among other products and services. EULAs and comparable end-user service agreements ordinarily contain conditions limiting use including resale, as well as governing warranties, product returns, complaints and disputes.¹⁶⁷

At their best, EULAs are framed in simple language. Their conditions, while protective of the drafter, may redress customer needs both equitably and effectively.¹⁶⁸ At their worst, EULAs require a decipherer's code to unpack their self-serving technical and legal jargon, including the right of suppliers to change their terms virtually at any time.¹⁶⁹ Customer friendly or not, most EULAs include conditions that avoid or limit supplier liability that impose requirements on customers, and are directed at reducing costs and

preserving profit margins of suppliers.¹⁷⁰ Despite provisions in EULAs allowing customers to return products within specified time periods, retailers sometimes decline to accept such returns once software packages have been opened.¹⁷¹ Suppliers sometimes use fine print clauses in their contracts to justify variations in conditions governing warranties, product returns, complaints and disputes despite the absence of the purchaser's contemporaneous assent.¹⁷² The contractual basis for such additional conditions is grounded variously in the implication of terms into contracts, customer acquiesce, waiver of rights, or ratification.¹⁷³

The rationale behind restrictive conditions in EULAs is economic and legal. EULAs enable modern distributors to restrict the end use of their products in order to operate efficiently. If producers are to develop goods that can easily be copied and sold, they are entitled to impose conditions dissuading copying for resale.¹⁷⁴ The contractual justification is that customers expressly, impliedly, or ostensibly assent to the prohibition on copying and resale.¹⁷⁵ The reality is that EULAs may be held to extend the copyright of suppliers beyond that which ordinarily arises both by consent of the parties and by operation of law,¹⁷⁶ as arguably arose in *Pro-CD v Zeidenberg*.¹⁷⁷ The case for promoting software security might regress into stifling creativity.

EULAs have their supporters. Typifying judicial support for EULAs that restrict end user rights is *M.A. Mortenson Co, Inc v Timberline Software Corp*.¹⁷⁸ There, the court enforced a shrink-wrap licence limiting a software producer's liability for consequential damages on grounds that the limitation was part of the bargain to which both parties assented and was legally enforceable.

With some End Users' Licence Agreements growing more complex and invasive, concern over their misuse is growing. In doubt is the extent to which suppliers use them more as swords than as shields. In contention is whether conditions in some EULAs subvert the rights of consumers who are ill-informed, misled or intimidated into "accepting" them.¹⁷⁹ Questioned is whether conditions in EULAs that are disclosed after the date of purchase are part and parcel of pre-existing contracts or more truly *ex post facto* constructions arising *ex contractu*.¹⁸⁰ At



issue is the extent to which conditions in EULAs are not only draconian, but also lack cognisable purchaser assent.¹⁸¹

A double-edged concern is that, should EULAs not be regulated for unfairness, their drafters will use them as self-serving weapons in their already formidable arsenal of weapons. Should EULA be subject to regulation, their drafters will invent new forms of EULAs in order to avoid the effect of such regulation. At issue is the risk that some suppliers may try to use them to achieve unfair, oppressive or unreasonable results.¹⁸²

The efficient and fair use of EULAs does not reside in general assumptions about their virtues and vices, but in how judges apply them in fact.¹⁸³ EULAs can be valuable if they promote the robust exchange of goods and services, but troubling if they promote exchanges that are unfair.¹⁸⁴ They can be efficient if they reduce economies of scale in contracting and reasonable if they lower production costs and prices.¹⁸⁵ They can be both fair and efficient if they foster cooperation between parties engaged in e-commerce, as when suppliers warrant the quality of their products, but unfair if they deny e-purchasers the right to complain about the paucity of product warranties.¹⁸⁶

Given these issues, according to what criteria should courts determine the legitimacy of end user agreements? And how should they determine when a particular EULA has crossed the line between conscionable and unconscionable conduct, both procedurally and substantively?¹⁸⁷

Restricting EULAs and service contracts

Concern over suppliers using licencing agreements to subvert consumers is not limited to EULAs or online purchasing.¹⁸⁸ Comparable issues arise when suppliers of cellular phones employ service agreements to restrict use and bar class actions against suppliers. In the recent California Court of Appeal decision, *Gatton v T-Mobile*,¹⁸⁹ the court declined to enforce a condition in the service contract of a mobile phone supplier, T-Mobile, requiring purchasers to submit claims to binding arbitration if they wished to dispute T-Mobile's practices. The court considered several related conditions in T-Mobile's service contract: selling locked

mobiles that prevented switching to other mobile carriers, prohibiting consumers from bringing class actions, and imposing fees on purchasers who terminated their contracts prior to expiration. In issue was whether these conditions were unconscionable.¹⁹⁰

In declaring the arbitration clause requiring waiver of a class action in the cellular service contract unenforceable, the court found that T-Mobile's conduct was both procedurally and substantively unconscionable. In particular, the arbitration clause denied consumers an affordable method of dispute resolution, seeking to undermine an apt process of consumer protection and facilitating corporate malfeasance.¹⁹¹

A complicating feature in *Gatton* was that, on its face, it resembled a traditional 20th century adhesion contract. T-Mobile was in a superior bargaining position in relation to its purchasers; its complex service contract was drafted in its favour; and prospective customers were presented with a take-it-or-leave-it option. They had the choice to buy on T-Mobile's terms or to forego purchasing, but not to dicker over the terms.¹⁹²

However, some of the trappings of traditional adhesion contracts were debatable in *Gatton*. For example, whether notice to customers was adequate or not, T-Mobile urged that it had explained the existence of qualifying conditions to prospective purchasers.¹⁹³

T-Mobile also did not dominate the mobile market, but was one among multiple mobile sellers. Customers could take their mobile business elsewhere if they were dissatisfied with the notified conditions of sale in T-Mobile's contract.¹⁹⁴

Nor is the provision for arbitration in a service contract inherently unfair. Expert arbitration is sometimes perceived to be more reliable and cost effective than reliance on dilatory judicial proceedings and juries with limited commercial expertise.¹⁹⁵

What the court found most disturbing in *Gatton* was that T-Mobile effectively avoided consumer protection laws in California by mandating mandatory arbitration and banning customers from bringing class actions.¹⁹⁶ In effect, T-Mobile had crossed the line between conscionable and unconscionable conduct by denying purchasers the most reasonable means of protecting their



legal interests, namely, through a cost-effective class action.¹⁹⁷

Gatton can be conceived at different levels of abstraction. At its most simplistic, the court regulated an “unbargained” contract. As a contracting party, T-mobile was far better resourced than its average customers. It sold specialised products to largely unsophisticated end users. It used forceful sales techniques to persuade them to sign service agreements; and it relied on volume sales to multiple consumers to cover costs and build profit margins. T-mobile also intended customers to “adhere” to conditions that prohibited them from pursuing litigation in the most economically feasible manner, namely, by sharing resources and costs through class actions.

At a higher level of abstraction *Gatton* is about the boundary between conscionable and unconscionable contracting. The arbitration clause in *Gatton* was unconscionable because an essential requirement in forming a contract, namely, “a bargained for” exchange. Troubling, too, was the perception that the supplier sought to repress due process itself.¹⁹⁸

What is notable about *Gatton* is the court’s consideration not only over when a contract condition is unfair, but over the nature of that unfairness.¹⁹⁹ What is also distinctive is that it treated the availability of market choice to purchasers as a mitigating factor, not a cure to unconscionability.²⁰⁰

THE ART OF DISTINCTION

Is a *sui generis* jurisprudence needed to regulate “wrap” contracts? If so, how distinctive ought that jurisprudence to be? Answering these question involves evaluating the qualities which courts attribute to “wrap” contracts, the construction they give to mutual assent and the standard of reasonableness by which they measure that assent.²⁰¹ In particular:

- Is there a principled basis upon which courts should differentiate “wrap” from other types of contracts?
- Is there a principled distinction among different kinds of “wrap” contracts, such as be-

tween click-wrap and browse-wrap contracts upon which courts can rely?

- If so, how might courts use such distinctions to establish the limits of procedural and substantive unconscionability without producing either rigid or amorphous results?²⁰²

Let us start with two cases, the one holding that conditions in a browse-wrap contract are unconscionable and the other declaring a click-wrap agreement conscionable.

Declaring browse-wrap clauses unenforceable

In an “early” wrap case in 2002, the US District Court for the Northern District of California in *Comb v PayPal, Inc*²⁰³ held that a browse-wrap clause²⁰⁴ was procedurally unconscionable on grounds that the customer lacked the opportunity to negotiate over the terms of a take-it-or-leave-it contract.²⁰⁵ The court held that the clause was unconscionable because it permitted PayPal unilaterally to freeze customer accounts; it prohibited customers from consolidating claims; and it required them to submit disputes to the American Arbitration Association which was prohibitively expensive given that the price of the average transaction was \$55.²⁰⁶ The court was persuaded that PayPal acted unconscionably in requiring that arbitration take place in Santa Clara County, California, “PayPal’s backyard”.²⁰⁷ The court was not dissuaded that customers who were dissatisfied with arbitration could have resort to courts of law.²⁰⁸

In its defence, PayPal argued that the disputed clause did not encompass such essential items as food or clothing, and that consumers had access to alternative services to those provided by PayPal. In rejecting these arguments, the court found that PayPal had engaged in a take-it-or-leave-it contract with customers who lacked meaningful choice in assenting to conditions that PayPal had imposed on them. The fact that consumers could resort to alternative suppliers was insufficient to hold PayPal’s click-wrap clause enforceable under California law. Ultimately, the court restricted the power of online service providers, not because the transaction involved a browse-wrap contract, but because of



the unconscionability arising from disputed conditions within it.²⁰⁹

Declaring click-wrap clauses enforceable

In contrast to *PayPal*, in *DeJohn v TV Corporation International* the US District Court for the Northern District of Illinois in 2003 upheld a click-wrap contract.²¹⁰ In applying New York Law, the *DeJohn* court used reasoning quite different to that employed in *Comb v PayPal*.²¹¹

The *DeJohn* court concluded that, despite the use of a click-wrap take-it-or-leave-it clause in its own favour, TV Corporation International did not use unduly high pressure tactics or deceptive language to induce prospective customers to click their assent. The court treated as irrelevant the fact that, absent fraud, the customer had not read the contract, stating: "failure to read a contract is not a get out of jail free card." The court reasoned that "it is the unfair use of, not the mere existence of, unequal bargaining power that is determinative."²¹² The *DeJohn* court acknowledged that it would have decided the case differently had the drafter used considerable pressure tactics, had the language in the contract been deceptive, or had an inequality in bargaining power resulted in significant unfairness to the customer: but such was not the case here.²¹³

Nor was the court swayed by the argument that the customer lacked market choice. So long as a customer could reject the contract and purchase comparable services elsewhere, here a domain name registration, he had market choice.²¹⁴

Finding distinctions

A superficial distinction between *PayPal* and *DeJohn* is that each court held a dissimilar view about the nature of one-sided contracting and unconscionability in particular. For the *DeJohn* court, customers who conclude click-wrap agreements should be bound to have assented to them other than in exceptional circumstances when undue pressure tactics and the abuse of bargaining power renders their assent imperfect.²¹⁵ For the *PayPal* court, the issue was less about

purchasers in browse-wrap contracts lacking notice of conditions at the time of acceptance, but whether the disputed conditions were fundamentally unfair.

Despite these inferred distinctions, both cases share key attributes: both resemble traditional adhesion contracts; the disputed conditions were dictated by the supplier; the supplier was in a superior bargaining position *vis-a-vis* its customers; and customers had little, if any, opportunity to dicker over the conditions in "unbargained" contracts. So too, the plaintiffs in both cases had some market choice; both could have resorted to alternative suppliers. One can speculate over whether either plaintiff would have resorted to alternative suppliers had they understood the onerous conditions in dispute, or whether other suppliers would have dictated similar conditions. What is probable, however, is that plaintiffs in comparable circumstances in both cases would not have studied the conditions before assenting to them, given their complexity, their inclusion among a myriad of other clauses, and the improbability of fully comprehending their legal significance.²¹⁶ In both cases, the essential features of a "contract," a reasonable opportunity for the purchaser to review and disseminate conditions before acceptance, is more fictional than real, a quasi-contract more than a consensual bargain.²¹⁷ At the same time, customers in both cases did have market choice.

Using distinctions

One conclusion to draw is that an underlying distinction between cases like *PayPal* and *DeJohn* lie in their different characterisations as "wrap" agreements. The applicable conditions in *PayPal* were included in a browse-wrap contract. The applicable conditions in *DeJohn* were contained in a click-wrap contract.²¹⁸ All other factors being constant, click-wrap agreements are more likely to be declared enforceable than browse-wrap contracts. The reasoning is that, in browse-wrap contracts users ordinarily gain access to the product being purchased only by accessing a hyperlink to the applicable contract. As a result, users may be subject to onerous conditions without ever having accessed and "agreed" to them prior to acceptance. In contrast, prospective users in click-wrap contracts can only signify



acceptance after having clicked a dialogue box indicating “I agree” to the applicable conditions that precede that dialogue box. The result is that the click-wrap user has notice of those conditions prior to acceptance and cannot use the product without signifying assent to them, even though most customers are unlikely to read those conditions.²¹⁹

The courts in *PayPal* and *DeJohn* could have distinguished between click-wrap and browse-wrap contracts on comparable grounds; but they chose not to do so. Other courts distinguish between different kinds of “wrap” contracts. In *Specht v Netscape Communications Corp.*,²²⁰ the court declined to enforce a condition compelling arbitration in Netscape’s browse-wrap contract. In doing so, it distinguished between the supplier giving notice of licensing restrictions prior to the purchaser signifying acceptance in click-wrap contracts and not doing so in browse-wrap agreement.²²¹ Click-wrap and shrink-wrap contracts, it argued: “require users to perform an affirmative action unambiguously expressing assent before they may use the software.”²²² In comparison, Netscape’s browse-wrap license in *Specht*:

“... allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.”²²³

The court concluded that internet browsers were not bound by the Netscape licence which they had not previously viewed and which they had not known in advance of their assent to use Netscape. In providing users with access to the disputed licence only after downloading the program and only after scrolling down to the disputed clause, the court held that Netscape had acted procedurally unconscionably.²²⁴

There is no magic in holding click-wrap contracts enforceable and browse-wrap contracts unenforceable.²²⁵ Courts can decide cases on other grounds, for example, by deciding that disputed conditions are insufficiently large or visible to be enforceable, or that the selection of a forum in the “backyard” of the licensor is unfair.²²⁶ They can also “cure” procedural defects in a plaintiff’s assent on grounds that the

defendant provided subsequent notice of the disputed conditions in which the plaintiff acquiesced or ratified.²²⁷ Judges may draw different inferences from conditions in contracts according to the parties, products and markets in issue.²²⁸

Consider two illustrations. In *Specht v Netscape Communications Corp.* the court decided that an arbitration clause in the browse-wrap contract was procedurally unconscionable.²²⁹ In *Forrest v Verizon Communications, Inc.*,²³⁰ the court declined to find that the scroll box in a browse-wrap contract for a DLS service was so small as to provide insufficient notice to plaintiffs.²³¹ Both cases involved browse-wrap contracts in which the courts could have reasoned that plaintiffs lacked prior notice of special conditions and therefore did not assent to them; but in determining whether the disputed condition was unconscionable, both courts relied on material facts beyond differentiating between browse-wrap and other “wrap” contracts.²³²

None of this is to declare that “wrap” cases are decided by judicial whim. The purpose is rather to demonstrate the difficulty of predicting on what grounds courts will decide “wrap” contracts.²³³ The further purpose is to demonstrate that, however materially similar or different “wrap” cases may appear to be, one may end up attempting to reconcile the irreconcilable.

LEGAL DIFFERENCES

Judges sometimes construe the protection of customers in mass markets in light of statutory differences among state jurisdictions. Some states like California are perceived to have consumer-friendly laws. Others, like New York, are considered to have laws that are not consumer friendly.²³⁴ The question arises as to the impact of consumer protection laws on how judges construe “wrap” contracts.

Trends in consumer protection

At the outset, it is again important not to overstate the importance of trends in consumer protection law in predicting how judges might decide “wrap” cases.²³⁵ Judicial trends do not invariably follow legislative policy on consumer pro-



tection in different states because legislative policy, being general and often variable in nature, cannot anticipate the precise issues that arise for judicial determination. Courts also often apply legislative policies disparately to accommodate evolving contract practices such as in relation to e-commerce.²³⁶

Even in states with strong consumer protection laws like California, courts may reach inconsistent decisions on consumer protection.²³⁷ Courts in other jurisdictions may not follow suit. Strong Federal Court opinions like *Zeidenberg* that declare conditions in "wrap" agreements enforceable on grounds of mutual assent²³⁸ may be offset by decisions that declare them unenforceable on grounds of a lack of mutual assent.²³⁹ Determinations that render contract conditions unenforceable for producing grave inconvenience or unfairness may be offset by decisions enforcing such clauses as efficient and fair.²⁴⁰ Opinions that declare mandatory arbitration unenforceable in cases like *Gatton* may be buttressed by cases like *Brower v Gateway* that enforce mandatory arbitration.²⁴¹

Differences of fact

Judges may decide cases, based less on *a priori* principles of law, such as the rules of offer and acceptance, than on the facts they deem to be material in particular cases. For example, they may regard the kind of "wrap" contract as material, or highlight instead how it applies in a particular case. In so acting, they may embody the realist tradition of "fact scepticism."²⁴²

As an illustration, in *Hotmail Corp v Van\$Money Pie*²⁴³ Hotmail applied for an injunction against defendants who used Hotmail's free online services to distribute unsolicited email spam advertising pornography. Hotmail's click-wrap contract had expressly prohibited users who assented to its Terms of Service from using Hotmail email accounts to transmit unsolicited email. Defendants had assented to those Terms of Service by clicking a dialogue box and then used Hotmail accounts to send spam. They had also altered return email addresses to indicate falsely that email had been sent from a Hotmail account, rather than from its true source and they had inserted the plaintiff's

mark in the email reply address. Hotmail moved to enjoin defendants from sending spam which it alleged stated falsely that it came from Hotmail's service and from using Hotmail accounts as mail boxes for replies.²⁴⁴

The court imposed a preliminary injunction on the defendants. It also upheld the prohibition in the click-wrap contract on grounds that defendants had agreed to be bound by Hotmail's Terms of Service by clicking "I agree" after having the opportunity to view those Terms.²⁴⁵ The court held further that defendants' use of Hotmail's mark in the reply address likely would confuse the public, causing recipients to think that Hotmail was implicated in sending them unwanted spam. The court also found that defendants' conduct was likely to violate the *Computer Fraud and Abuse Act* and constituted a trespass on chattel.²⁴⁶

The issue is not that the court in *Hotmail* ill-conceived of evolving governmental policy in regard to the use of spam. Legislative and judicial "policies" increasingly purport to regulate the use of spam in circumstances like *Hotmail*.²⁴⁷ The issue revolves around the manner in which the court weighed the evidence. Its rationale that customers have advance notice of conditions in click-wrap prior to clicking "I agree" is explicable in terms of traditional principles of offer and acceptance giving rise to mutual assent. Of greater moment, however, is the extent to which the court distinguished between the legitimate and illegitimate use of email on the basis of public policy considerations beyond the assent of the parties.²⁴⁸ For some judges, the overriding concern is to regulate abusive consumer practices in the public interest.²⁴⁹ For others, the goal is to balance the commercial interests of service providers against the freedom of users to determine the manner of use.²⁵⁰ For yet others, the aim is to restrict the application of factors that subvert strict adherence to the principle of mutual assent to contract.²⁵¹ The *Hotmail* court adopted a blend of private and public, contractual and social interest considerations. However "private" the assent of parties to discrete transactions might be, the court was preoccupied with public policy in regulating the use of spam. Given the evolving regulation of the internet, courts are likely to give different weights to perceived ills, treatment and cures in the use of new technologies in our complex information age.²⁵²



CODE INCURSIONS

Commercial codes have evolved, more slowly than case law, to regulate new commercial and consumer practice. The Uniform Computer Information Transaction Act (UCITA), originating in draft Art.2B of the UCC,²⁵³ stipulated, among other provisions, for click-wrap users to consent to applicable conditions only after the provider had given them the opportunity to review the terms of the contract and decide whether or not to assent.²⁵⁴ A key purpose of the drafters was to render click-wrap contracts enforceable, but subject to service providers giving users reasonable notice of material conditions in their service agreements. The UCITA comments provided further instruction, notably in comment 5 of section 112 which set out a model contract clause permitting purchasers to return products within 30 days of the purchase date.²⁵⁵

The success of the UCITA has been limited. Approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999,²⁵⁶ it was subsequently adopted by two states, Maryland and Virginia.²⁵⁷ In 2002, the NCCUSL amended the UCITA in order to make it more palatable²⁵⁸; but in 2003, it officially suspended its efforts to obtain further state adoptions.²⁵⁹

As to attributes, the UCITA falls short as an all-encompassing “wrap” code. It attempts to regulate “wrap” conditions in a complex and evolving field. However, commentators criticise it for, among other reasons, being biased in favour of software licensors, detrimental to most users, and for allowing software licensors to include terms in mass-market licenses that prohibit uses which are otherwise permissible under federal law.²⁶⁰

The fate of the UCITA exemplifies tensions in balancing private and public interests in “wrap” contract practices. However uniform laws may be framed, their fate rests on whether they are deemed to be pro- or anti-business, administratively unwieldy or adaptable in application.

What remains is to reflect on the nature of mutual assent in “wrap” contracting. Are “wrap” contracts in general distinctive, or distinctive as a sub-set of rolling contracts? Are particular types of “wrap” contracts distinctive, such as browse-

wrap contracts; and how does that distinctiveness impact upon the mutual assent to contract?

PERFECTING ASSENT

As was stated at the outset, the law governing “wrap” contracts is most readily determined by applying the ordinary principles governing assent to contract.²⁶¹ An argument can be made, however, that these ordinary principles are supplemented by a “contract-as-product” conception of contracting, in which “the terms are a package deal” giving rise to single and determinative “take-it-or-leave-it” choice.²⁶² Under the mutual assent construction, courts need to consider whether the customer assented to the material terms contained in the supplier’s offer.²⁶³ Under the “contract-as-product” construction the end result is the same, mutual assent is deemed to be present or absent. But the reasoning by which courts arrive at that determination revolves around the contract-as-product itself and less around assessing whether a customer has assented to a discrete bargain. The question is to assess the extent to which “wrap” contracts fall within the rubric of contract-as-product, and if so, the effect of that classification upon traditional principles of offer and acceptance.²⁶⁴

Assent in principle

Applying ordinary principles of offer and acceptance, consent to a “wrap” contract is either perfected or it is unperfected and inchoate.²⁶⁵ The contract is perfected if the parties evince mutual assent or *consensus ad idem*.²⁶⁶ It is unperfected if the assent of customers is somehow absent or flawed.²⁶⁷

Unperfected assent is divided into two broad categories: assent that can be perfected or cured and assent that cannot be cured.²⁶⁸ Perfecting the unperfected assent of customers in “wrap” contracts can take place when a court implies a term into a contract by operation of law, sometimes referred to as “filling gaps”, as when courts imply that a supplier must perform in good faith.²⁶⁹ Such implication may also occur if a judge interprets a “wrap” contract *contra proferentum*, against the drafter.²⁷⁰ This practice of restricting the ambit of unconscionable term



by implication of terms or resolving ambiguities against the drafter is envisaged by § 2-302(1) of the UCC. It provides that courts may “so limit the application of any unconscionable clause as to avoid any unconscionable result.”²⁷¹

Under ordinary principles of offer and acceptance, courts may perfect conditions in “wrap” contracts if they are reasonably satisfied that both parties assented to those conditions with reasonable knowledge and understanding of their nature and significance.²⁷²

Courts may decline to perfect conditions in “wrap” contracts by holding that customers did not reasonably assent to those conditions and that the absence of such assent cannot be cured.²⁷³ Such decisions may arise substantively when suppliers impose conditions on purchasers that limit their right to return goods or resale them to others. Those decisions may occur procedurally when e-suppliers mandate arbitration and outlaw class actions.²⁷⁴ In each case, and especially in the latter, courts may refuse to enforce “wrap” conditions.²⁷⁵

In contrast, courts may treat “wrap” contracts as unperfected but capable of being perfected if they are satisfied that they can cure the defect by implying reasonable terms into those contracts based on party practice, trade usage, or operation of law.²⁷⁶ Such construction may occur, for example, where judges infer that customers have constructive notice of “wrap” condition at the time of contracting or ratified them by complying with those conditions.²⁷⁷ Such construction also arises when judges construe ambiguous conditions so as to render them reasonable and fair.²⁷⁸ Judicial gap filling is also justified on grounds that it produces efficient results.²⁷⁹

The classical reason for discouraging courts from perfecting imperfect assent is that courts should “not make contracts”²⁸⁰ By doing so, they are arguably interfering with freedom of contract, although it is repeatedly evident that courts that imply terms into contracts do “make” at least parts of a contract.²⁸¹ The same rules seemingly do not apply to courts that “unmake contracts” by striking them down or construing “wrap” conditions in them restrictively. The inference is that courts are doing no more than that which they are appointed to do, determining the presence or absence of assent.²⁸²

As a matter of judicial practice, courts that apply the ordinary common law principles of mutual assent to contracts reach all-or-nothing determinations. Either they hold that both parties have assented to the disputed conditions, rendering them enforceable; or they hold that mutual assent is absent upon which those conditions are unenforceable. The practical effect of courts declaring such conditions either enforceable or unenforceable is the absence of middle ground in which conditions are enforced in part or in a modified manner. If judges are willing to imply terms into “wrap” contracts, they can render those conditions enforceable in part, as when courts imply a reasonable standard or period of notice with which a supplier must comply in order for a condition restricting returns or resale to be enforced. The result is a “winner take some” as distinct from a “winner take all” consequence, result. The condition is not enforced as expressed in the contract itself, but as reconstituted by the court in order to arrive at an equitable result.²⁸³

Perfecting incomplete contracts

Under an assent theory of contracting, a contract-as-product construction of “wrap” contracts triggers a tension between judges “making” contracts by perfecting assent and “unmaking” contracts by declining to perfect that assent.²⁸⁴ If a contract-as-product is grounded in mutual assent, it ought not to be reconstituted on a basis other than mutual assent.²⁸⁵ If courts are to perfect assent, they ought not to “make” conditions based on extrinsic evidence that vary from that assent.²⁸⁶ If courts are prohibited from “making” wrap contracts,²⁸⁷ they should not “unmake” them by implying terms based on party practice or trade usage that vary from their express terms.²⁸⁸

The perimeter of implied terms

Courts may imply terms into contracts on equitable grounds based on the nature of the “wrap” condition in dispute and kind and degree of disparity in bargaining power between the parties. They may imply terms that e-suppliers provide purchasers with reasonable notice of onerous



conditions²⁸⁹ and that they exercise “best efforts” to ensure timely and complete delivery and service in a contract-as-product transaction.²⁹⁰ Courts may imply terms by operation of law, such as in complying with unfair contract and consumer protection laws, or on grounds that they are construing contracts-as-products in accordance with a legislative scheme.²⁹¹

The judicial management of “wrap” contracts

A further reason for judges to perfect the imperfect assent in contract-as-product cases is in managing mass market transactions. This approach challenges the distinction between the judicial management of long-term relationships and the tendency of courts to avoid managing one-off transactions.²⁹² Contract-as-product transactions are one-off in the formal sense: that on acceptance of an offer the sale is concluded. However, the “wrap” transaction usually has a tail. That tail consists of ongoing duties that “wrap” supplier place on purchasers, such as not to resell the “wrap” product, or courts place on suppliers to allow return of goods within a reasonable time, or to repair or replace defective goods.²⁹³ Judges manage “wrap” contracts, too, in interpreting choice of law and arbitration clauses in favour of consumers,²⁹⁴ and in declining to enforce “terms later” conditions.²⁹⁵ The function of judicial management is also to ensure good faith performance.²⁹⁶ As Justice Antonin Scalia once observed, the duty to perform in good faith under the UCC Code is significant “in implying terms in the contract.”²⁹⁷ In implying ongoing duties to perform “wrap” contracts in good faith, judges also determine how to manage those contracts.²⁹⁸ They cannot require e-suppliers to negotiate in good faith;²⁹⁹ but they can insist on preserving the stability of contracts-as-products against a floodgate of mass consumer litigation; they can strike down “wrap” conditions they consider unconscionable in the interests of fairness. Judges can also ground the supplier’s duty of good faith performance on the plain meaning of the contract, or on the business context surrounding each transaction.³⁰⁰

The judicial management of “wrap” contracts is assuredly controversial. Courts that apply ordinary principles of offer and acceptance may well resist managing contracts, assuming that

transactions should be managed by the parties themselves. Presumably both parties undertake to perform that to which they agreed and no court should manage them, except in the event of default.³⁰¹ Those who favour the judicial management of “wrap” transactions are likely to interject that such transactions are not truly consensual.³⁰²

The justification for the judicial management of contracts-as-products is also that such transactions are a series of comparable one-off transactions which together constitute a composite course of dealings affecting a series of consumers who are comparably situated.³⁰³ By subjecting an e-supplier to a duty to perform in good faith towards a “wrap” customer in a particular case, the court ordinarily manages a series of transactions involving similarly situated consumers as well.³⁰⁴

The quasi-public rationale for a judge to manage a contract-as-products is in response to public policy.³⁰⁵ Courts can adopt various guidelines in managing such contracts, including assessing the certainty and predictability of decisions, the costs of enforcing them, and their impact upon comparably situated purchasers. Judges may also consider the adverse social impact of their decisions, varying from the threat of a floodgate of litigation to supplier bankruptcy.³⁰⁶

The case for the judicial management of “wrap” contracts, along with rolling contracts generally, is compelling. Such management helps to transcend all-or-nothing remedies that lead to enforcement or non-enforcement of “wrap” conditions. The ongoing supervision of contracts-as-products can assist in ensuring that collaborative remedies are reasonably understood and fairly implemented.³⁰⁷ Judges can also interpose implied duties of cooperation that are conceived less as extra-contractual than as part of the apparatus of judicial management of contracts-as-products.³⁰⁸

Judges may resist managing “wrap” contracts so as not to substitute their opinions for the will of the parties,³⁰⁹ because of their perceived mandate to consider adjudicative not social facts,³¹⁰ because social fact evidence lies within the purview of legislatures,³¹¹ or simply because the judicial management of such contracts may be inefficient.³¹² Judges may avoid considering the



economic hardship borne by consumers generally on grounds that doing so raises policy considerations outside the judicial purview.³¹³

Resistance to contractual management is likely to have its supporters. The so-called "New Formalists" are likely to view it as an exemplification of an undesirable judicial activism.³¹⁴ Other detractors are likely to be less emphatic, but nevertheless still concerned about judicial exuberance, conceivably preferring governments to encourage nonprofits to participate in the regulation of contracts.³¹⁵ They may not insist that judges evince the meaning of "wrap" contracts through the subjective intention of the parties, recognising that the subjective intention is a proxy for the intention of the drafter. Their objection is more likely to be that courts should not drift too far afield from consensual conceptions of contract law, "wrap" contracts or not.³¹⁶

The most cogent defence of the judicial management of "wrap" contracts is for judges to constrain "wrap" suppliers that devise contracts-as-products precisely on the assumption that courts will refrain from managing them.³¹⁷ Their case rests on the bulwark that courts should not stand aside in the face of contracts-as-products devised as "private legislation" by aberrant "wrap" drafters.³¹⁸

The claim for the judicial management of "wrap" contracts is, at best, modest. Management of contracts is part of a long tradition of judicial activism. The claim also does not gain-say the prospect of alternative modes of regulating "wrap" contracts, such as through expert administrative agencies,³¹⁹ non-profit trade associations and public watchdogs.³²⁰ Nor does it argue against authoritative codification, not unlike the UCC's displacement of much of the common law of sales. What makes courts suited to managing "wrap" contracts is not the ability of judges to decide such cases consistently, efficiently or even fairly; but that legislatures often lack the political will to do so in their stead.

Legislative gap filling

The perceived need for systematic regulation of e-contracting is directly related to concerns about

regulating the use of the internet on public policy grounds.³²¹

If the UCITA serves as a guide, however deficient it may be, legislatures are likely to be hard pressed to "fill gaps" in consumer protection laws, or to redress aberrant commercial practices which courts cannot manage themselves. However ambivalent their political will, legislatures may feel impelled over time to react to inconsistencies in the judicial treatment of e-commerce.³²²

More often than not, legislatures will remain on the sidelines because the contractual issues are too variable to justify general law amendments, the political climate is unsuitable for law reform and courts are relied upon to protect consumer interests on a case-by-case basis.³²³ Whatever its form, the regulation of "wrap" contracts by legislatures is likely to be controversial in inception or operation on grounds of being pro-business, pro-consumer, both, or neither.³²⁴ Inertia, as part of the legislative legacy on consumer protection to date, is likely to continue, as it has with the UCITA.³²⁵

GUIDELINES

The law governing "wrap" and related rolling contracts in e-commerce as elsewhere is all about regulation. Regulation occurs through the contract itself, as when dominant suppliers use contracts to regulate sales. Regulation is also the means by which law-makers curb the practices of dominant parties that use contractual conditions in on- and offline transacting in an unconscionable manner.

Regulating transactions by contract

Drafters of "wrap" contracts can plan their drafting in anticipation of consumer protection legislation and to avoid litigation. For example, click-wrap suppliers can limit the risk of contracts being declared unenforceable by providing users with contractual choices, such as 30 days in which to opt out of the contract in states like Maryland and Virginia that follow the UCITA.³²⁶ Suppliers can also incorporate specific code comments such as comment 5 of section



112 of the UCITA illustrating user assent in click-wrap contracting.³²⁷

Despite taking drafting guidance from codes, contract drafters cannot be assured when courts will enforce conditions in “wrap” contracts,³²⁸ treat conditions in contracts consistently,³²⁹ or adopt comparable standards of substantive and procedural unconscionability.³³⁰

Jurisprudential developments

No consistent jurisprudence has emerged over the limits of substantive unconscionability in “wrap” contracting. Judges may construe “wrap” contracts literally or contextually.³³¹ They may construe conditions in “wrap” contracts according to the parties’ subjective intentions, or objectively in light of the perceived unfairness of specific conditions. Judges may concentrate on the form of box-wrap, shrink-wrap, click-wrap or browse-wrap contracts, or they may disregard that form.³³²

Courts may also modify their interpretation of “wrap” contracting over time. Typifying such differences are shifts in the State of New York from judicial scepticism towards consumer protection in *Zeidenberg*³³³ to their protection. For example, in 2007 the Attorney General of New York successfully sued security company, Blue Coat Systems, over a condition in the EULA that prohibited customers from testing and benchmarking its services against those of competitors.³³⁴ The State won even though Blue Coat Systems had advised consumers about the disputed conditions in advance of their purchasing its services.³³⁵

Courts may decide using very different reasoning. They may uphold browse-wrap contracts that fail to provide prior notice of “wrap” conditions, maintaining that those conditions are not unduly onerous, that they are widely used or reasonably known by end-users. They may decline to enforce conditions in click-wrap contracts that provide parties with prior notice of applicable conditions, insisting that the conditions are oppressive.³³⁶

Guidelines in regulating contracts

A variety of general drafting guidelines can assist drafters of “wrap” contracts to avoid findings

of procedural and substantive unconscionability. They may provide advance notice of onerous conditions; they may draft conditions succinctly; they may provide reasonable time limits in which customers can opt out of contracts; and they may incorporate explanatory notes directly or by references into such “wrap” contracts. These guidelines may be drawn from trade practice including embodied in trade codes.³³⁷ They may also be modeled on uniform laws.³³⁸

There is no assurance that courts will enforce such conditions in contracts. However, the more opportunity end users are given to choose whether or not to contract, the more likely are courts to enforce conditions in those contracts.³³⁹ The longer the prior notice of conditions given to purchasers, the more likely are courts to enforce those conditions.³⁴⁰ The more visible the notice of conditions, the greater is the prospect of judicial enforcement, as when drafters avoid legal jargon and refrain from hiding contract conditions amidst complex clauses.³⁴¹

When all is said and done, “wrap” jurisprudence will depend significantly on the prevailing judicial philosophy. Judges may decline to enforce browse-wrap contracts on principled grounds, because they are too far removed from the rules of offer and acceptance. In contrast, they may uphold click-wrap contracts because they resemble standard form contracts that are used in cruise “ticket” cases in which reasonable notice is provided prior to the “voyage”.³⁴²

There is nothing new in all this, except that judicial shifts in attitudes towards “wrap” contracts inevitably influence how mass suppliers draft “wrap” contracts; the manner in which mass suppliers redraft their contracts ultimately influences how courts construe those contracts; and the cycle repeats itself.

CONCLUSION

However much we live in a consumer-driven, price-conscious and information-laden era, the fundamental character of consumer dependence upon dominant suppliers still prevails. So, too, does the basis for legally protecting consumers under the law of unconscionability.³⁴³

Even accepting that 21st century e-consumers are more market savvy than their



predecessors were a century ago, few are sophisticated in the subtleties of law in fields like intellectual property.³⁴⁴ Most e-consumers are insufficiently resourced to defend against the litigation muscle of software and computer suppliers and online service providers.³⁴⁵ Conditions in “wrap” contracts that mandate arbitration and prohibit class actions make it virtually impossible for the average online customer to sue. The cost of litigation in all but a few cases exceeds the value of any one individual transaction.³⁴⁶ Most e-consumers also lack confidence to sue in the legal or arbitral “backyard” of their online suppliers. Even that small class of adventitious cybersquatters who buy “confusingly similar” domain names to famous brands for resale are unrepresented in almost all legal proceedings; and in 90 per cent of cases heard, the disputed name is either expunged or transferred to the holder of the famous trademark.³⁴⁷

Even though most customers in mass online markets are more agile than their counterparts were a century ago, they are no match for well heeled suppliers that build formidable barriers to suit. Even as repeat business and consumer-resellers have grown in sophistication in a global electronic economy, neophyte consumers continually enter the software and online marketplace.

Despite all this, it remains debatable whether mass e-consumers in “wrap” contracting are fundamentally different from mass consumers a century ago. The onerous conditions in End Users’ Licensing Agreements that curb browse-wrap consumers are not fundamentally different from the disadvantages faced by post-industrial revolution consumers. Then and now, large-scale suppliers had strong economic incentives to exclude class actions, to extract early termination fees and to impose performance conditions on consumers *in futuro*. Then and now, mass suppliers were equipped to engage in hard selling tactics to cajole customers into one-sided standard form agreements not limited to EULAs which consumers lacked deep pockets to resist.³⁴⁸

Today as yesterday, too, most consumers choose not to read conditions in “click” contracts.

They sign off on unread agreements on the assumption that agreeing without question is more profitable than the risk of the agreement backfiring. Now as then, they do not trust mass suppliers to follow the egalitarian good; but they also do not distrust them enough to scrutinise each deal with a fine toothcomb.

What is different today is the multi-dimensional character of the information age end user. “Wrap” consumers function along a spectrum from all knowing, savvy and wily buyers to those totally lacking in knowledge or opportunity to become aware of onerous conditions in browse-wrap contracts.³⁴⁹

On one level, shrink-wrap, box-wrap, click-wrap and browse-wrap contracts mirror the dominance of e-suppliers over the consuming public. On another, they provide consumers with the opportunity to acquire affordable goods and services they could never have afforded in the past.

The divergence between mercantilism and consumerism has also changed in post-modern times.³⁵⁰ Today’s e-suppliers invent novel contractual conditions to protect their economic interests, while consumers are generally better informed in choosing e-suppliers. Today’s courts struggle to find a balance between consumer protection and protecting e-suppliers from new classes of repeat business and consumer-resellers. Today’s law reformers strive to reconcile mercantile and consumer interests, as they did with the UCITA; and they sometimes fail to accomplish that task.

Tomorrow’s legislatures and courts will find the task of law reform no easier. They will be expected to respect the wisdom of past legal orders without become captive to the sentiment of the moment. They will be relied upon to recognise that the needs of tomorrow, like the needs of yesterday, may be different to the needs of today.



Notes

1. Shrink-wrap licenses are named after the clear plastic wrapping in which most software packages are contained on purchase. It sets out the binding conditions to which the software purchaser must "adhere" on opening the package.
2. On the distinctive judicial treatment of different types of wrap contracts, see below, "The art of distinction".
3. Box-wrap refers to the conditions to which the purchaser must adhere on opening the box. Click-wrap and browse-wrap contracts refer to online transactions.
4. In a click-wrap contract the user is provided with the terms and conditions of the contract, usually an end user agreement, at the end of which a dialogue "I agree" box pops up on the screen which the user must sign in order to download or otherwise use the product.
5. In browse-wrap contracts the user is not presented with the terms and conditions of the contract, but is provided with a hyperlink to another website at which those terms are included.
6. On the growth of e-commerce as a business and management strategy, see Diana Kao and Judith Decou, "A Strategy-based Model for e-commerce Planning" 103 *Industrial Management & Data Systems* 238 (2003).
7. The drafting of Art.2 of the Uniform Commercial Code, through the creative genius of Karl Llewellyn, was grounded in legal realism. See Allen R. Kamp, "Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context", 59 *Alb. L. Rev.* 325 (1995). Kamp notes "Llewellyn's first drafts of the Code provided for a jury composed of merchants to make [factual] determinations." (at 340); David Ray Papke, "How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code", 47 *Buff. L. Rev.* 1457, 1459-60 (1999); Ingrid Michelsen Hillinger, "The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law", 73 *Geo. L. J.* 1141(1985). See too Daniel A. Farber, "Toward a New Legal Realism", 68 *U. Chi. L. Rev.* 279, 300 (2001).
8. See Seona Valentine Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation", 29 *Phil. & Pub. Affairs* 205 (2000) who states: "The unconscionability doctrine, famously, operates as a shield and not as a sword. One may protect oneself against enforcement of an unconscionable contract, but one may not obtain damages for having been subject to an unconscionable offer; nor may one seek restitution for compliance with an unconscionable contract" (at 229).
9. See, e.g. Scott J. Burnham, "Is Article 2 Regulatory or Facilitatory? A Socratic Dialogue", 68 *Ohio ST. L. Rev.* 57 (2007).
10. Art.2-302 states: "§ 2-302. Unconscionable contract or Clause: (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." On the history and scope of §2-302 see esp. Arthur Allen Leff, "Unconscionability and the Code—The Emperor's New Clause", 115 *U. Pa. L. Rev.* 485 (1967); H.C.C. Jr., "Unconscionable Sales Contracts and the Uniform Commercial Code, § 2-302", 45 *Va. L. Rev.* 583 (1959). On §2 of the UCC, see James J. White and Robert S. Summers, *Uniform Commercial Code* (5th ed.) (2000), pp270-71; Julian B. McDonnell, "Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence", 126 *U. Pa. L. Rev.* 795, 797 (1978); Caroline Edwards, "Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment", *St. John's Rev.* 663 (2004); James J. White, "Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition", 75 *Mich. L. Rev.* 1262 (1977); Richard Danzig, "A Comment on the Jurisprudence of the Uniform Commercial Code", 27 *Stan. L. Rev.* 621, 621 (1975);
11. On the definition of EULA, see <http://www.webopedia.com/TERM/E/EULA.html> (Accessed January 29, 2009). See further below, "Enter the dragon: End Users' Licence".
12. See, e.g. Stephen E. Friedman, "Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts", 46 *Ariz. L. Rev.* 677 (2004).
13. See below "Perfecting assent" and "Guidelines".
14. The phrase "contract of adhesion," originating in the law of insurance, is imputed to E.W. Patterson, "The Delivery of a Life Insurance Policy", 33 *Harv. L. Rev.* 198 (1919). See too Reuben Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance", 47 *Mod. L. Rev.* 502 (1984); Frederick Kessler, "The Protection of the Consumer under Modern Sales Law, Part 1: A Comparative Study", 262 *Yale L. J.* (1964).
15. On these different classes of "new" consumers, see "The 21st century "wrap" consumer" below.
16. The prototype shrink-wrap license case is *Step-Saver Data Sys., Inc v Wyse Tech*, 939 F.2d 91 (3d Cir. 1991) in which Step-Saver purchased a software program, MultiLink, from Wyse Tech for the purpose of resale. Each MultiLink package included a shrink-wrap licence by which Wyse Tech disclaimed all express and implied warranties and limited remedies against it for replacement of the program. Following a class action against Wyse Tech that the program was defective, it sued Step-Saver. The Court held that the disclaimer and limitation of liability clauses in the shrink-wrap licence were not enforceable because Step-Saver had not assented to them. See too *Arizona Retail Sys. v Software Link, Inc.* 831 F. Supp. 759 (D. Ariz. 1993). This 3rd Circuit diverges from the 7th Circuit decision of Judge Easterbrook in *ProCD, Inc v Zeidenberg*, 86 .3d 1447 (7th Cir. 1996) (holding shrink-wrap licence enforceable). See below, "Enter Judge Easterbrook".
17. Perhaps the first click-wrap contract considered by the courts was *Forrest v Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002), involving the choice of a forum clause in a click-wrap licensing agreement. The plaintiffs, in a class action, sought to establish that the services provided by Verizon, the defendant, were subject to disruptions and were slower than warranted. The class action was dismissed at trial based on the choice of law clause in the subscription agreement. On appeal, the court dismissed plaintiffs' argument that the small size



of the scroll box rendered notice inadequate, (at 1010–11). The appellate court also dismissed the argument that the clause was unreasonable because it designated a forum (Virginia) in which the case could not proceed as a class action, (at 1012).

18. The leading browse-wrap contract case is *Specht v Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). On *Specht*, see below, fn.185. See generally, Robert A. Hillman & Jeffrey J. Rachlinski, "Standard-Form Contracting in the Electronic Age", 77 N.Y.U.L. Rev. 429, 493 (2002); Richard G. Kunkel, "Recent Developments in Shrink-wrap, Click-wrap and Browse-wrap Licenses in the United States", 9(3) Murdoch Univ. Electronic L.J. (Sept.2002), available at <http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93.html> (Accessed January 29, 2009).

19. See Arthur Allen Leff, "Unconscionability and the Code. The Emperor's New Clause", above fn.10.

20. On such evils associated with EULA, see below, "Enter the dragon: End Users' Licence Agreement".

21. On attempts to arrive at uniform law to govern rolling agreements, see Rob Schultz, "Rolling Contract Formation Under the UN Convention on Contracts for the International Sale of Goods", 35 Cornell Int'l. L.J. 263 (2002).

22. For a view to similar effect, see Florencia Marotta-Wurgler, "'Unfair' Dispute Resolution Clauses: Much Ado about Nothing?" in Omri Ben-Shahar, (ed.), *Boilerplate: The Foundation Of Market Contracts* (Ann Arbor: University of Michigan, 2007), p.45. See too Brian Bix and Jane Winn, "Divergent Perspectives on Electronic Contracting in the US and EU", 54 Cleveland State U. L. Rev. 175 (2006).

23. Illustrating these developments is the American Law Institute's ongoing project, Principles of the Law of Software Contracts. The project is intended to guide courts in drafting legal principles in deciding disputes involving software transactions and in guiding parties in the drafting of software contracts. See further Ali, "Principles of The Law of Software Contracts—Discussion Draft" (2007).

24. On the potential explosion of lawsuits against shrink-wrap suppliers including for failing to provide purchasers with reasonable notice of conditions, see, e.g. Corey Doctorow, "Shrinkwrap Licenses: An Epidemic of Lawsuits Waiting to Happen", at <http://www.informationweek.com/news/showArticle.jhtml?articleID=197003052> (Accessed January 29, 2009).

25. 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

26. On the overlap and differentiation between the standardisation and customisation of contracts, see Margaret Jane Radin, "Boilerplate Today: The Rise of Modularity and the Waning of Consent", 104 Mich. L. Rev. 1223 (2006).

27. Patterson is reputed to have coined the phrase "adhesion contract." See Edwin W. Patterson, "The Delivery of a Life Insurance Policy", above fn.14 (at p.222).

28. See Friedrich Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract", 43 Colum. L. Rev. 629, 642 (1943).

29. For classic cases on adhesion contracts and the law of unconscionability, see *Henningsen v Bloomfield Motors, Inc.*, 161 A.2d 69, 87 (N.J. 1960) ("Extreme inequality of bargaining between buyer and seller [regarding adhesion contracts] ... is now often conspicuous. Many buyers no longer have any real choice in the matter.") (Citing Lawrence Vold, *Handbook of the Law of Sales* (2nd ed. 1959), p.447. See too *A & M Produce Co v FMC Corp.*, 186 Cal. Rptr. 114, 125 (Cal. Ct. App. 1982) ("[O]ne suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing").

30. See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960), p.370. Llewellyn added: "The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement..." above in note. See too William Twining, *Karl Llewellyn and the Realist Movement* (1985).

31. The logic behind this large body of law is that "The ideal adherent who would read, understand, and compare several forms is unheard of in the legal literature and, I warrant, in life as well." Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction", 96 Harv. L. Rev. 1173, 1179 n.22 (1983).

32. On adhesion contracting in modern insurance law, see, e.g. Michelle Boardman, above fn.28. See too Susan Randall, "Judicial Attitudes towards Arbitration and the Resurgence of Unconscionability", 52 Buffalo L. Rev. 185 (2004).

33. "Contracts of adhesion ... will not be enforced against the weaker party when it is (1) not within that party's reasonable expectations; or (2) is unduly oppressive, unconscionable or against public policy." *AEB & Associates Design Group, Inc. v Tonka Corp.*, 853 F. Supp. 724, 732 (S.D.N.Y. 1994) (citations omitted).

34. For a critical view on the paternalistic need for "the decision maker ... to take the beneficiary under his wing and tell him what he can and cannot do," see Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power", 41 Md. L. Rev. 563, 634 (1982).

35. *Restatement (Second) Of Contracts* § 211 comment B (1979) (See E. Allan Farnsworth, *Contracts* (1982), p.248, citing *Schupp v Davey Tree Expert Co*, 209 N.W. 85, 86 (Mich. 1926) (no duty to read); *Dowagiac Mfg Co v Schroeder*, 84 N.W. 14, 14 (Wis. 1900) (duty to read)).

36. This entailed placing limits on the bargain principle without displacing the value of the bargain in contract law. See Melvin Aron Eisenberg, "The Bargain Principle and Its Limits", 95 Harv. L. Rev. 741 (1982). See too Michael Trebilcock, *The Limits of Freedom of Contract* (1993); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN.L.REV.753 (1981).

37. On such paternalism in contract law, see See Shiffrin, above fn.8. On paternalism particularly in the law of contracts, see Eyal Zamir, "The Efficiency of Paternalism", 84 Va. L. Rev. 229, 230 (1998); Eric A. Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract" Legal Stud. 283, 312-14 (1995); Anthony T. Kronman, "Paternalism and the Law of Contracts", 92 Yale L. J. 763, 778-84 (1983).



38. The *contra proferentem* rule is a rule of construction, as distinct from a rule of law by which courts interpret contracts against the drafter. On the application of the *contra proferentem* rule, see *Beanstalk Group, Inc v AM General Corp*, 283 F.3d 856, 858–859 (7th Cir. 2002); *Missouri Pacific R.R. v Kansas Gas & Electric Co*, 862 F.2d 796, 800 (10th Cir. 1988); *First State Underwriters Agency of New England Reinsurance Corp v Travellers Insurance Co*, 803 F.2d 1308, 1311–1312 (3rd Cir.1986). See too Richard A. Posner, “The Law and Economics of Contract Interpretation”, American Law and Economic Association Annual Meetings, paper 56, at 9-14 (2005), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1527&context=alea> (Accessed January 29, 2009); Leon E. Trakman, “Interpreting Contracts: A Common Law Dilemma”, 59 Can. Bar Rev. 241 (1981). But see Michelle E. Boardman, “The Allure of Ambiguous Boilerplate”, 104 Mich. L. Rev. 1105 (2006). Boardman argues that resolving ambiguities is more about judicial precedent than contract drafting and more about the relationship between the drafter and the court than about the consumer as a contracting party.

39. See *Gatton v T-Mobile USA Inc.*, 152 Cal.App.4th 571 (2007), para.5: “Oppression, for purposes of rendering a contract provision procedurally unconscionable, arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” See too Robert A. Hillman, “Debunking Some Myths About Unconscionability: A New Framework for U.C.C. § 2-302”, 67 Corn. L. Rev. 1 (1981).

40. On the “rational” action by which consumers make sacrifices in return for, among other benefits, lower prices, see, e.g. Hillman and Rachlinski, “Standard Form Contracting”, above fn.18 at 429.

41. For a classical article differentiating between such property and liability rules, see Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral”, 85 Harv. L. Rev. 1089, 1092–93, 1106–10 (1972). See too Richard Craswell, “Property Rules and Liability Rules in Unconscionability and Related Doctrines”, 60 U. Chi. L. Rev. 1, 2–3 (1993). Cf. Thomas Cooley, Ramon Marimon, and Vincenzo Quadri, “Aggregate Consequences of Limited Contract Enforceability”, 112 J. Pol. Economy 817 (2004).

42. See William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987), pp.281–82 [Dealing with the exclusion of liability by manufacturers of, among others, motor vehicles, for personal injury].

43. There are roughly three schools of thought on such paternalism. The first school rejects paternalism primarily on grounds that consumers are rational actors. See, e.g. Milton and Rose Friedman, *Free To Choose*, (1980), Ch.7; Richard Posner, “Rational Choice, Behavioral Economics, and the Law”, 50 Stan. L. Rev. 1551 (1998); Richard Posner, “The Federal Trade Commission”, 37 Chi. L. Rev.47 (1969). The second school objects to those who reject paternalism, without endorsing a conception of paternalism. See e.g. Christine Jolls, Cass R. Sunstein, and Richard Thaler, “A Behavioural Approach to Law and Economics”, 50 Stan. L. Rev. 1471 (1998). The third school subscribes to an asymmetrical paternalism grounded in behavioural psychology. See, e.g. Colin Camerer, Samuel Issacharoff, George Lowenstein, Ted O’Donoghue and Matthew Rabin, “Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism’”, 151 Pa. L. Rev. 1211 (2003).

44. Contracts sometimes explicitly prohibited the customer from altering the terms of a contract. See, e.g. *Gold Star v Manshul Construction Corp*, No. CIV. 93-4213-SS, 1995 U.S. Dist. LEXIS 5120, at *21 (S.D.N.Y. Apr. 19, 1995) (construction contract); *Miller v. Dobbs Mobile Bay, Inc.*, 661 So. 2d 203, 206 (Ala. 1995) (insurance contract); *Velasquez v Crown Life Ins. Co*, No. CIV.A. 97-064-M, 1999 U.S. Dist. LEXIS 13186, at *9 (S.D. Tex. August 10, 1999) (insurance contract) section.

45. On a classic adhesion—bullet proof—securities contract, see Judge Posner’s decision in *Carr v CIGNA Securities, Inc*. 95 F.3d 544, 548 (7th Cir. 1996). “[I]t would be unreasonable to expect Carr to pore through 427 pages of legal and accounting mumbo-jumbo looking for nuggets of intelligible warnings.”

46. See John E. Murray, Jr., “The Standardized Agreement Phenomena in the Restatement (Second) of Contracts”, 67 Cornell L. Rev. 735 (1982).

47. “A party misled as to the utility to be derived from a proposed transaction cannot properly evaluate the true benefits and costs of the deal ... The presumption that the agreement will lead to a value increasing exchange, therefore, is rebutted.” See Michael I. Myerson, “Efficient Consumer, The Efficient Consumer Form Contract: Law and Economics Meets the Real World”, 24 Ga. L. Rev. 583, 589 (1990).

48. See *Broemmer v Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz., 1992). See too the Restatement on form contracts, *Restatement (Second) of Contracts* § 211(3) (1981).

49. From a cost-benefit perspective, this inefficiency included the disutility of the transaction owing to the purchaser’s inability to determine the contract’s true costs and benefits. See Meyerson, above fn.47, at 589. See too Kevin E. Davis, “Licensing Lies: Merger Clauses, The Parol Evidence Rule and Pre-Contractual Misrepresentations”, 33 Val. U. L. Rev. 485, 500 (1999).

50. See, e.g. Robert A. Hillman, “On-Line Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?” in Omri Ben-Shahar, above fn.22, Ch.6, p.83.

51. But see Daniel McFadden, “Rationality for Economists?” 19 J. Risk & Uncertainty 73, 73 (1999).

52. Russell Korobkin argues for the efficient use of standard form contracts, including “greater use of mandatory contract terms and judicial modification of the unconscionability doctrine to better respond to the primary cause of contractual inefficiency”, see Russell Korobkin, “Unconscionability: Bounded Rationality, Standard Form Contracts, and Unconscionability”, 70 U. Chi. L. Rev.1203 (2003).

53. On the cost disincentive to study detailed contract terms, see Melvin A. Eisenberg, “The Limits of Cognition and the Limits of Contract”, 47 Stan. L. Rev. 211, 243 (1995).

54. See generally David Gilo and Ariel Porat, “The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects”, 104 Mich. L. Rev “The Strategy of Boilerplate”, 104 Mich. L. Rev. 1033 (2006); Henry E. Smith, “Modularity in Contracts: Boilerplate and Information Flow”, 104 Mich. L. Rev. 1175 (2006).



55. On a now classical discussion of the growth of global cyber-commerce involving consumers, see David R. Johnson and David Post, "Law and Borders: The Rise of Law in Cyberspace", 48 Stan. L. Rev. 1367 (1996).
56. See Edwin W. Patterson, "The Delivery of a Life Insurance Policy", above fn.14.
57. See, e.g. Julia Hornle, "Disputes Solved in Cyberspace and the Rule of Law", 2000(2) J. Inform. L. & Tech., available at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/hornle/ (Accessed January 29, 2009); Ethan Katsh, "The New Frontier: Online ADR Becoming a Global Priority", *Dispute Resolution Magazine*, (Winter 2000); Jack L. Goldsmith, "Against Cyberanarchy", 65 Chi. L. Rev. 1199 (1998).
58. On the economic and legal consequences of competitiveness in cyberspace, see, e.g. Rajeev K. Goel and Edward W.T. Hsieh, "Internet Growth and Economic Theory", 4(2) Netnomics, 1385 (2002); Niva Elkin-Korena and Eli M. Salzberger, "Law and Economics in Cyberspace", Int'l. Rev. L. & Econ. 553 (1999).
59. Id. See too Bebchuk and Posner, "One Sided Contracts in Competitive Consumer Markets", 104 Mich. L. Rev. 827 (2006).
60. On the analogous claim that consumer behaviour influences supplier behaviour in product liability cases, see Paul H. Rubin, "Courts and the Tort-Contract Boundary in Product Liability", in F.H. Buckley (ed.), "Introduction", in *The Fall And Rise Of Freedom Of Contract*, (1999), pp.119 and 122.
61. On this view, see, e.g. Bebchuk and Posner, "One-Sided Contracts", above fn.59 at 827.
62. On the Law Merchant, see Leon E. Trakman, "From the Medieval Law Merchant to E-Merchant Law", 53 Toronto. L. J. 265-304 (2003); Leon E. Trakman, *The Evolution Of The Law Merchant: Our Commercial Heritage* (Fred B. Rothman, 1983).
63. On the growth of e-merchant law, see Leon E. Trakman, "From the Medieval Law Merchant", above fn.62.
64. See Alan Schwartz & Louis L. Wilde, "Intervening in Markets on the Basis of Imperfect Information A Legal and Economic Analysis", 127 U. Pa. L. Rev. 630, 653 (1979).
65. On this "efficient" outcome, Posner, "The Law and Law Economics of Contract Interpretation", above fn.38 at 9-14. But see Meyerson above fn.46, at 601-02.
66. David Gilo and Ariel Porat, above fn.54 at 683.
67. See, e.g. Omri Ben-Shahar and James J. White, "Boilerplate and Economic Power in Auto Manufacturing Contracts", 104 Mich. L. Rev. 953 (2006); Michael I. Myerson, above fn.47 at 598.
68. On the assumption that standardisation reduces negotiation costs in incomplete (unperfected) contracts, see, e.g. Ronald A. Dye, "Costly Contract Contingencies", 26 Int'l Econ. Rev. 233, 236-37, 245-46 (1985).
69. That is not to say that mass contracting is not costly, except that suppliers ordinarily incur lower costs in devising standardised contracts in which purchasers acquiesce in return for lower prices. See Alan Schwartz and Joel Watson, "The Law and Economics of Costly Contracting", 20 J. Law Economics & Organization 2 (2004).
70. See, e.g. Jason Scott Johnston, "The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers", 104 Mich. L. Rev. 857 (2006); B. Ahdieh, "The Strategy of Boilerplate", 104 Mich. L. Rev. 1033(2006).
71. Argument over the percentage of consumers who understand complex terms in adhesion contracts is speculative. It is easier to determine the percentage that bring suit on account of such terms. See, e.g. Steven P. Croley and Jon D. Hanson, "Rescuing the Revolution: The Revived Case for Enterprise Liability", 91 Mich. L. Rev. 683, 687 (1993); See Schwartz & Wilde, above fn.64 at 660.
72. The assumption here is that aggressive e-consumers may produce a "herd" mentality not only among fellow consumers, but also among e-suppliers who respond to consumer demands for fear of a ripple effect not limited to a class action. On the psychology of herd behaviour, see Marcel Kahan and Michael Klausner, "Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior, and Cognitive Biases", 74 Wash. U. L. Q. 347, 353-59 (1996); David Scharfstein and Jeremy Stein, "Herd Behavior and Investment", 80 Amer. Econ. Rev. 465, 466 (1990); Myerson, above fn.47, at 596; Schwartz and Wilde, above fn.64 at 630.
73. On these categories of "new" consumers, see below, "The 21st century "wrap" consumer".
74. On such cost efficiencies associated with standardised consumer contracts, see Myerson, above fn.47, at 599.
75. See, e.g. Omri Ben-Shahar and James J. White, "Boilerplate and Economic Power in Auto Manufacturing Contracts", above fn.67.
76. See, e.g. David D. Friedman, "Law's Order: What Economics Has To Do With Law And Why It Matters" 156-57 (2000); Keith N. Hylton, "The Economics of Litigation and Arbitration: An Application to Franchise Contracts", 32 J. Legal Stud. 549 (2003).
77. As was stated in *Groff v America Online, Inc*, plaintiffs "could not enroll unless they clicked the 'I agree' button which was immediately next to the 'read now' button or ... next to the 'I disagree' button at the conclusion of the agreement." 1998 R.I. Super., LEXIS 46 (Super. Ct., R.I., Providence, May 27, 1998) (C.A. No. PC 97-0331), at 12-13. But see Ian Macneil, "Bureaucracy and Contracts of Adhesion", 22 Osgoode Hall L. J. 5 (1984) (arguing that adhesive conditions are often drafted to discourage consumers from reading them, should the drafter subsequently wish to invoke them).
78. Rakoff describes this standardisation is as much directed at maintaining organisational hierarchies as trying to be efficient. See Rakoff, "Contracts of Adhesion", above fn.31, at 1220-29. For the view that often seemingly sophisticated consumers are unable to bargain over contract terms in practice, see, e.g. Robert Prentice, "Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis",



2003 Ill. L. Rev. 337 (2003); Russell Korobkin, "The Status Quo Bias and Contract Default Rules", 83 Cornell L. Rev. 608, 611–12 (1998).

79. For the argument that such after-the-fact "modifications" do not form part of the contract under Art.2 of the UCC unless they are expressly agreed upon by the parties, see, e.g. Richard E. Speidel, "Symposium: The Revision of Article 2 of the Uniform Commercial Code: Contract Formation and Modification Under Revised Article 2", 35 Wm. & Mary L. Rev. 1305, 1323 (1994).

80. On whether savvy consumers not limited to cyber-consumers make things better for consumers generally and/or whether suppliers are able to detect and cater to aggressive consumers while taking advantage of others, see Clayton Gillette, "Rolling Contracts as an Agency Problem" 2004 Wisc. L. Rev. 679. See too Meyerson, "Efficient Consumer", above fn.46, at 602.

81. See Croley and Hanson, above fn.63; Myerson, above fn.47, at 1270–71; Victor P. Goldberg, "Institutional Change and the Quasi-Invisible Hand", 17 J. L. & Econ. 461, 485 (1974).

82. Such market or product awareness is not limited to this class of consumers, but is widely canvassed among consumers generally in product liability cases. See, e.g. Richard A. Epstein, "The Unintended Revolution in Product Liability Law", 10 Cardozo L. Rev. 2193 (1989); George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law", 14 J. Legal Stud. 461 (1985); Alan Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis", 97 Yale L. J. 353 (1988). But see contra Mark E. Roszkowski and Robert A. Prentice, "Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis", 33 St. Louis U. L. J. 19 (1988) (arguing that consumers lack the opportunity to bargain for safety risks).

83. On a lawyer-consumer plaintiff, see, e.g. *Forrest v Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002), above fn.17, where the purchaser of an online DSL service licence was a lawyer working for the Department of Justice, and presumably able to understand the legal significance of the forum selection clause in the applicable contract. But see Stewart Macaulay, "Freedom from Contract: Solutions in Search of a Problem?", 2004 Wis. L. Rev. 778, 802-819 (arguing that educated consumers are unlikely to comprehend clauses that refer disputes to the National Arbitration Forum).

84. See above fn.77. On related issues in relation to manufacturers' warranties in the motor vehicle industry, see Whitford, "Law and the Consumer: A Case Study of the Automobile Warranty", 1968 Wis. L. Rev. 1006, 1013. See too George G. Bogert and Eli E. Fink, "Business Practice Regarding Warranties in the Sale of Goods", 25 Ill. L. Rev. 400, 406 (1930).

85. 245 F. Supp. 2d 913 (C.D. Ill. 2003), discussed below, "Declaring click-wrap clauses enforceable".

86. Arguably, the term "consumer-reseller" is internally contradictory insofar as a consumer who resells is not the ultimate consumer.

87. See, e.g. Jacqueline D. Lipton, "Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy", 40 Wake Forest L. Rev.1361 (2006); Andrew J. Grotto, "Due Process and In Rem Jurisdiction Under the Anti-Cybersquatting Consumer Protection Act", Colum. Sc. & Tech. L. Rev.1 (2003), available at <http://www.law.columbia.edu/stlr/> (Accessed January 29, 2009); Rachel Keane, "How the Domain Name Scuffles are Rocking the Foundations of Trade Mark Law", VUWL L. Rev.12 (2001); Lisa M. Shrock, "The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from within the UDRP Framework", 51 Duke L. J. 817 (2001); "iBrief, Cybersquatting: The Latest Challenge in Federal Trademark Protection", (2001) Duke J. Law & Tech. 9; I.M.Azmi, "Domain names and cyberspace: the application of old norms to new problems", 9 Int'l. J. Law Inform. Tech. 193 (2000).

88. The Anticybersquatting Consumer Protection Act (ACPA), 15 USC §1125(D) "was intended to prevent 'cybersquatting', being the registration of a distinctive trademark and domain name of others in respect of which the registrants has no legal right, acts in and/or uses that registration in bad faith with the intention of profiting from the name and goodwill associated with the disputed mark or domain name." See further *Shields v Zuccarini*, 254 F3d 476 (3d Cir. 2001) ("[T]he intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight spelling or typing error to reach an unintended site ... is a classic example of a specific practice the ACPA was designed to prohibit.")

89. On the WIPO, see <http://www.wipo.int/portal/index.html.en> (Accessed January 29, 2009).

90. See Jacqueline D. Lipton, above fn.76; Lisa M. Shrock, above fn.87.

91. On the new cyberspace Law Merchant, See Clyde Wayne Crews Jr. and Adam Theiner, *Who Rules the Internet: Governance and Jurisdiction* (Cato Institute, 2003); Ethan Katsch and Janet Rifkin, *Online Dispute Resolution, Resolving Conflicts in Cyberspace* (Jossey-Bass, A.Wiley Co., 2001).

92. One can rationalise complexity in some consumer contracts by asserting that standardisation invites complexity; and further that complexity arises on account of the need to plan for uncertainties, such as for commercial impracticability. See Karen Eggleston, Eric A. Posner, and Richard Zeckhauser, "The Design and Interpretation of Contracts: Why Complexity Matters", 95 Nw. L. Rev. 91 (2000). However, neither standardisation nor planning for an uncertain future necessarily requires either complex drafting or the use of one-sided contract clauses that favour the drafter. See further Trakman, "Winner Take Some: Loss Sharing and Commercial Impracticability", 69 Minn. L. Rev. 471(1985).

93. See further Jean Braucher, "New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products", in *Consumer Protection in the Age of the "Information Economy"* (Jane K. Winn ed., 2006) p.77; James R. Maxeiner, "Standard-Terms Contracting in the Global Electronic Age: European Alternatives", 28 Yale J. Int'l. L. 109 (2003).

94. It also meant that courts were expected to interpret the contract according to its "plain word meaning". See further Eric A. Posner, "The Parol Evidence Rule, Plain Meaning, and the Principles of Contractual Interpretation", 146 U. Pa. L. Rev. 533 (1998).

95. A less credible goal in adopting contractual rules of interpretation in "wrap" contracts may be to exclude the application of the *contra proferentem* rule. See generally, Michael E. Sykuta, "Empirical Research on the Economics of Organization and the Role of the Contracting and Organizations Research Institute", CORI, Contracting and Organizations Research Institute, University of Missouri-Columbia, December 19, 2001. See too above fn.38.



96. For an argument in favour of parties choosing their own method of contract interpretation, see Avery Weiner Katz, "The Economics of Form and Substance in Contract Interpretation", 104 Colum. L. Rev. 496 (2004).

97. See, e.g. Owen D. Jones, "Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology", 95 Nw. U. L. Rev. 1141, 1151 (2001). See too Kenneth G. Dau-Schmidt, "Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law", 1997 Wis. L. Rev. 389, 397; Paul J. H. Schoemaker, "The Expected Utility Model: Its Variants, Purposes, Evidence and Limitations", 20 J. Econ. Lit. 529, 530(1982).

98. Redressing these concerns are a key goal of, among other legislation, the The Anticybersquatting Consumer Protection Act (ACPA), 15 USC §1125(D). See too above fn.77.

99. Public policy directed against activities like gambling is a two edged sword. States are interested in discouraging gambling; but they are also interested in revenues generated from gambling. See, e.g. *People of New York v World Interactive Gaming Corp*, 185 Misc. 2d 852, 714 N.Y.S.2d 844 (N.Y. County Sup. Ct. 1999) in which the Court's decision that state and federal law prohibited the offer of internet gambling in New York benefited offline gambling in New York. But cf. *In re Mastercard Int'l Inc Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002) in which the Court held that the Wire Act does not prohibit non-sports internet gambling.

100. This statement is difficult to prove. Still, the growth of new classes of savvy cyber-consumers, however abundant, are likely to be far less numerous than the growth of "wrap" consumers generally. See further below, "Enter the dragon: End Users' Licence Agreements".

101. See further above, "Repeat-order consumers".

102. See, e.g. *ProCD Inc v Zeidenberg*, 86 F.3d 1447(7th Cir 1996).

103. On the argument that a purchaser for the purpose of resale, here of domain names, is not really a "consumer", see *DeJohn v TV Corporation International*, 245 F. Supp. 2d 913 (C.D. Ill., 2003).

104. *ProCD, Inc v Zeidenberg*, 86 F.3d 1447(7th Cir 1996); see further below "Enter Judge Easterbrook".

105. *ProCD, Inc v Zeidenberg*, para.7.

106. *ProCD, Inc v Zeidenberg*, para.27.

107. 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998)

108. *Brower v Gateway* at 248.

109. "While returning the goods to avoid the formation of the contract entails affirmative action on the part of the consumer, and even some expense, this may be seen as a trade-off for the convenience and savings for which the consumer presumably opted when he or she chose to make a purchase of such consequence by phone or mail as an alternative to on-site retail shopping." *Brower v Gateway* at 247. See further below, "Challenging the new orthodoxy".

110. See, e.g. Sajida A. Mahdi, "Gateway To Arbitration: Issues Of Contract Formation Under The U.C.C. And The Enforceability Of Arbitration Clauses Included In Standard Form Contracts Shipped With Goods", 96 Nw. U. L. Rev. 403, 418 (2001). See too Hillman and Rachlinski, "Standard Form Contracting", above fn.18, at 430; Mark A. French, Note, *Hill v Gateway 2000, Inc*, 12 Ohio St. J. On Disp. Resol. 811 (2000).

111. 246 A.D.2d 246, 676 N.Y.S. 2d 569 (App.Div.1998). On the significance of complex contracts in relation to comparative civil procedure, see John H. Langbein, "Comparative Civil Procedure and the Style of Complex Contracts", 35 Am. J. Comp. Law 381 (1987).

112. For this conception of the free market in cyberspace, see, e.g. Bruce L. Benson, "The Spontaneous Evolution of Cyber Law: Norms, Property Rights, Contracting, Dispute Resolution and Enforcement Without the State" J., 1 Law, Economics & Policy 269 (2005). These legal developments included the adoption of the Uniform Computer Information Transactions Act (UCITA), previously proposed 2B of the UCC which would render enforceable restrictions on contract practices that were previously in contract law and under intellectual property law. See below, "Code incursions".

113. 1998 R.I., Super. Ct., Lexis 46 (Super. Ct. R. I. Providence May 27, 1998)(C.A. No. PC 97-0331).

114. *Groff v America Online, Inc*, at *13.

115. The purchaser's "motive" in concluding a contract goes to the purchaser's reason for entering into a contract, such as a desire to play a computer game, as distinct from the purchaser's intention to enter into a binding legal relationship with the supplier. On the distinction between motive and intention, see Robert L. Hale, "Bargaining, Duress and Economic Liberty", 43 Colum. L. Rev. 603 (1943); Robert L. Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion", 35 Colum. L. Rev. 149 (1935); John P. Dawson, *Economic Duress—An Essay in Perspective* (1933), p. 253.

116. At 247.

117. On the "promise" theory of contracting, see Charles Fried, *Consent As Promise* (1981); Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising", 88 Mich. L. Rev. 489 (1989). On the "consent" theory of contracting, see Randy Barnett, "A Consent Theory of Contract", Colum. L.Rev. 269 (1986).

118. On the objective theory of contracting, see, e.g. Joseph M. Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation", 69 Fordham L. Rev. (2000); Michael I Myerson, "The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts", 47 U. Miami L. Rev. 1263, 1270 (1993).



119. On the contextual interpretation of contracts, see below, "The perimeter of implied terms".
120. On the nature and significance of freedom of contract, see Eisenberg, above fn.36; Trebilcock, above fn.36; Mensch, above fn.36.
121. On the straining of assent, see below, "Perfecting assent".
122. On a restrictive construction of the waiver of jury trials in commercial, as distinct from consumer cases, see *Gaylord Department Stores, Inc v Stephens*, 404 So.2d 586, 588 (Ala.1981); *North Charleston Joint Venture v Kitchens of Island Fudge Shoppe*, 416 S.E.2d 637 (S.C. 1992); *Proteus Books Ltd v Cherry Lane Music Co*, 873 F.2d 502 (2d Cir. 1989). For a discussion of "private judging" see Christopher H. Drahozal, "A Behavioral Analysis of Private Judging", *Law & Contemp. Prob.* 105 (2004); Alan Scott Rau, "Integrity in Private Judging", 38 S. Tex. L. Rev.485 (1997). See too Keith N. Hylton, above fn.62, at 549. See too Kevin Davis, above fn.49, at 528.
123. The nature of "due process" rights are identified with procedural unconscionability. See further below, "Guidelines".
124. On this cost to consumers, see Croley & Hanson, above fn.66, at 776; R. Ted Cruz & Jeffrey J. Hinck, "Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information", 47 *Hastings L.J.* 635, 664 (1996).
125. Leff, "Contract as a Thing", 19 *Am. U. L. Rev.* 131, 157 (1970). See too Richard L. Hasen, "Comment, Efficiency under Informational Asymmetry: The Effect of Framing on Legal Rules", 38 *UCLA L. Rev.* 391, 412-13 (1990). On connotations arising from "boiling-plated" other than the capacity of a dominant party to dictate terms to a subservient one, see, e.g. Todd D. Rakoff, "The Law and Sociology of Boilerplate", 104 *Mich. L.Rev.* 1235 (2006).
126. On these arguments, see, e.g. Todd D. Rakoff, "The Law and Sociology of Boilerplate"; Harry E. Smith, above fn.54 at.1175.
127. On the use of arbitration in contract, see esp. Bruce L. Benson, "Arbitration", in *Encyclopedia Law & Economics*, (Boudewijn Bouckaert and Gerrit de Geest eds., 2000), Vol. 5, p.159.
128. Such was the determination of the court in *Gatton v T-Mobile USA Inc.*, 152 Cal. App. 4th 571 (2007). See further below, "Enter The Dragon: End Users' Licence Agreement".
129. See, e.g. Cruz and Hinck, above fn.124, at 674; Goldberg, above fn.81 at 485; Meyerson, above fn.46, at 1270-71.
130. 152 Cal. App. 4th 571 (2007).
131. *Gatton v T-Mobile USA Inc*, Westlaw para.15.
132. See Patterson, "The Delivery of a Life Insurance Policy", above fn.14, at 222; Kessler, "Contracts of Adhesion", above fn.28, at 642.
133. For argument that non-drafting parties to standardised contracts are rational decision-makers only about some contract terms, and that drafting parties have the incentive to include terms that favour themselves, see Korobkin, above fn.52.
134. The rationale is that sophisticated consumers may not read fine print for similar reasons as business people fail to do so, in the hopeful expectation of performance under the contract, not default. On this "law and society" perceptions of businessmen, as distinct from consumers, see Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", 28 *Am. Sociological Rev.* 55,58 (1963). Even market sophisticated consumers differ from businesses in at least one respect: they lack the protection of "back room" lawyers to protect their legal interests should such optimism prove unjustified. See William C. Whitford, "Comment on a Theory of the Consumer Product Warranty", 91 *Yale L.J.* 1371, 1383 (1982).
135. But see Hillman and Rachlinski, "Standard Form Contracting", above fn.18, at 429.
136. On suppliers legislating through the contract, see below, "Enter The Dragon: End Users' Licence Agreement".
137. See, e.g. Michael I. Meyerson, "The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts", 47 *U. Miami L. Rev.* 1263, 1270 (1993).
138. Even strong proponents of the economic efficiency of the liberty to contract question the efficiency of a "bargain" into which one party misleads the other. See, e.g. Richard A. Epstein, "Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire", in *Fall and Rise*, above fn.55, at 39; Meyerson, "Efficient Consumer", above fn.66, at 589.
139. On consumer response to price, as distinct from other contract terms in the automobile industry, see William C. Whitford, "Law and the Consumer Transaction", above fn.84 at 1097.
140. See, e.g. J.S.Albanese, *Intellectual Property Theft and Combatting Piracy* (Transaction Pub., 2006); Adam D. Moore, *Intellectual Property and Information Control* (Transaction Pub., 2004).
141. See to this effect, Douglas D. Baird, "The Boilerplate Puzzle", in Omri Ben-Shahar, above fn.22, Ch.10, p.131.
142. For the view that the distinction between merchant and consumer contracts is overworked, see Alan Schwartz and Robert E. Scott, "Contract Enforcement and Interpretation: Contract Theory and the Limits of Contract Law", 113 *Yale L. J.* 541 (2003); Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 *Wake Forest L. Rev.* 295 (2005).
143. Judge Easterbrook, now Chief Judge of the United States Court of Appeals for the Seventh Circuit was formerly a professor of law at the University of Chicago. See further on his background and experience, http://en.wikipedia.org/wiki/Frank_Easterbrook (Accessed February 1, 2009).
144. 86 F.3d 1447 (7th Cir. 1996).
145. See W. David Slawson, *Binding Promises: The Late 20th-Century Reformation of Contract Law* (1996), p.21; www.enotes.com/wests-law-encyclopedia/pacta-sunt-servanda (Accessed February 1, 2009).



146. See above fn.144. On EULAs, see <http://www.webopedia.com/TERM/E/EULA.html%23> (Accessed February 1, 2009).

147. Above fn.144, at 1453.

148. At 1453.

149. See generally on the Court's failure to consider UCC §2: 207, Sajida A. Mahdi, "Gateway To Arbitration: Issues Of Contract Formation Under The U.C.C. And The Enforceability Of Arbitration Clauses Included In Standard Form Contracts Shipped With Goods", 96 Nw. U. L. Rev. 403, 418 (2001). Mark A. French, "Recent Developments: *Hill v. Gateway 2000, Inc.*," 12 Ohio St. J. On Disp. Resol. 811, 819-20 (1997); Kristin Johnson Hazelwood, "Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers", 55 Wash & Lee L. Rev. 1287 (1998). Batya Goodman, "Comment, Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract", 21 Cardozo L. Rev. 319, 352 (1999); Christopher L. Pitet, Note, "The Problem with 'Money Now, Terms Later': *ProCD, Inc v Zeidenberg* and the Enforceability of 'Shrinkwrap' Software Licenses", 31 Loy. L. A. L. Rev. 325, 327(1997).

150. See above fn.114 at 1452. On Chief Judge Crabb's very different construction of s.2-204 in the District Court, see *ProCD*, 908 F. Supp.645, at 652.

151. On the District Court's consideration of s.2-204, see *ProCD*, 908 F. Supp.645 at 655-656.

152. *ProCD*, 908 F. Supp.645 at 645, at 648-658.

153. See, e.g. Stewart Macaulay, "Freedom from Contract", above fn.83, at 802-819; Stewart Macaulay, "Relational Contracts Floating On a Sea of Custom? Thoughts about the Ideas of Ian MacNeil and Lisa Bernstein", 94 Nw. L. Rev. 775, 779 n.25 (2000) "When we look at a ProCD box, Judge Easterbrook's 'offer' becomes pure fantasy. The notice is printed on the bottom flap of the box, flanked by a statement in large type that there are 250 million telephone numbers on 11 CD-Roms and the bar code for the scanner. The notice is printed in 6-point type in a space 2 3/4th inches by 1 inch." See too, Roger C. Bern, "'Terms Later' Contracting: Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding", 2004 J. Law & Policy 642; Batya Goodman, Comment, "Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract", 21 Cardozo L. Rev. 319, 352 (1999); Kristin Johnson Hazelwood, Note, "Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers", 55 Wash. & Lee L. Rev. 1287 (1998); Brandon L. Grusar, Contracting Beyond Copyright: *ProCD, Inc. v. Zeidenberg*", 10 Harv. J. Law & Tech. 353 (1997).

154. See Note, "Contract Law. Shrink-wrap License, Seventh Circuit Holds That Shrink-wrap Licenses Are Enforceable. *ProCD, Inc v. Zeidenberg*", 86 F.3d.1447 (7th Cir 1996), 110 Harv. L. Rev. 1946 (1997).

155. Shiffrin, above fn.8, rejects judicial paternalism on grounds that it undermines the capacities, powers and entitlements of the autonomous agent, (at 220). She favours a "self-regarding" theory of unconscionability that empowers courts to decline to enforce contracts in which one party takes unfair advantage of, or exploits, the other, (at 230-1).

156. On debate over the extent to which Art.2 of the UCC is a merchant code to which consumer protection is peripheral, see, e.g. Scott J. Burnham, "Why Do Law Students Insist That Article 2 of the Uniform Commercial Code Applies Only to Merchants and What Can We Do About It?" 63 Brook. L. Rev. 1271, 1271(1997).

157. See generally, Dale Clapperton and Stephen Corones, "Unfair Terms in 'Clickwrap' and other Electronic Contracts", 35 Australian Bus. Law Rev. 152 (2007); P. Chatterjee, "Online Reviews: Do Consumers Use Them? Advances In Consumer Research" 28 *Association for Consumer Research* 129 (2001); E Katsh, J Rifkin, A Gaitenby, "E-commerce, E-Disputes and E-Dispute Resolution: In the Shadow of eBay Law", 15 Ohio State J. Dispute Res. 3 (2000).

158. See Macaulay, above fn.83; William C. Whitford, "*ProCD v. Zeidenberg* in Context", 2004 Wisc. L. Rev. 821.

159. On optimism as a behavioural motivation in psychology, see Neil D. Weinstein, "Unrealistic Optimism About Future Life Events", 39 J. Personality & Soc. Psychol. 806, 809-14 (1980).

160. For consideration of mutual assent to contract in relation to "wrap" contracts, see below, "Perfecting assent".

161. On the primarily facilitative function of Art.2 of the UCC and its regulatory function of unconscionable conduct, see above fn.7 and "The adhesion contract".

162. See Slawson, "Binding Promises", above fn.145 at 35.

163. This view underscores the legal realist conception of contract law as responsive to social and economic forces, not independent of them. See, e.g. Karl N. Llewellyn, "What Price Contract? An Essay in Perspective", 40 Yale L. J. 704, 734 (1931).

164. A glance at shrink-wrap cases beyond *Zeidenberg* shows differences of judicial opinion on the enforceability of such contracts. Compare, e.g. *ProCD, Inc v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that a shrink-wrap license is enforceable) with *Step-Saver Data Sys., Inc v Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (holding that a shrink-wrap license is not enforceable). Contrast *Hill v Gateway 2000, Inc.*, 105 F. 3d 1147 (7th Cir. 1997) (holding that Gateway's shrink-wrap license is enforceable) with *Klocek v Gateway 2000 Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding that a similar Gateway shrink-wrap license is not enforceable). See generally Sajida A. Mahdi, "Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. And the Enforceability Of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods", 96 Nw. U. L. Rev. 403, 418 (2001); Mark Andrew Cerny, Note, "A Shield Against Arbitration: U.C.C. § 2-207's Role in the Enforceability of Arbitration Agreements Included with Delivery of Products", 51 ALA. L. Rev. 821 (2000); Kristin Johnson Hazelwood, "Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers", 55 Wash & Lee L. Rev. 1287, 1316 (1998); Thomas J. McCarthy et al., "Survey: Uniform Commercial Code", 53 Bus. Law 1461, 1465-66 (1998); Mark A. French, "Recent Developments: *Hill v. Gateway 2000, Inc.*," 12 Ohio St. J. On Disp. Resol. 811, 819-20 (1997); Jean R. Sternlight, "Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers", Fla. Bar J., Nov. 1997.



165. See, e.g. *Klocek v Gateway, Inc.*, 104 F. Supp.3d 1332 (D. Kan., June 16, 2000). A box-wrap case, the court dealt with the rules governing the formation of a contract under UCC § 2-207. In declining to enforce an arbitration clause included in a computer box, the court held that, "Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of [Gateway's] Standard Terms" (at 134).

166. For an interview with Matt Zeidenberg, see William C Whitford, "ProCD v. Zeidenberg in Context", 2004 Wisc. L.Rev. 821. See too, above, "Enter Judge Easterbrook".

167. On software licenses, see H. Ward Classen, *A Practical Guide To Software Licensing For Licensees And Licensors* (2nd ed.,) (ABA, 2008). But see too "How to Write an End User License Agreement, EULA: More Than a Contract?" available at http://www.avangate.com/articles/eula-software_75.htm (Accessed February 1, 2009).

168. But see, e.g. Napster's "Terms and Conditions": "To the extent that in a particular circumstance any disclaimer or limitation on damages or liability set forth herein is prohibited by applicable law, then instead of the provision hereof [...] Napster shall be entitled to the maximum disclaimers and/or limitations on damage and liability available at law or in equity...", available at www.napster.com/terms.html (Accessed February 1, 2009).

169. Drafting vague and complex contracts may serve as an effective medium of discouraging the fainthearted from attempting to decipher the seemingly undecipherable. On the draconian nature of EULAs, see Benjamin Edelman, "Grokster and Claria Take License to New Lows, and Congress Lets Them Do It", at <http://www.benedelman.org/news/100904-1.html> (Accessed February 1, 2009); Larry Magid, "It Pays to Read License Agreements", in *PC Pitstop*, at <http://pcpitstop.com/spycheck/eula.asp> (Accessed February 1, 2009). But, cf. George G. Triantis, "The Efficiency of Vague Contract Terms: A Response to the Schwartz-Scott Theory of U.C.C. Article 2", 62 LSU. L. Rev. 1066 (2002).

170. Drafters have access to multiple instruments in drafting contract terms including their own prior form contracts, contracts used in the industry, usages giving such contracts meaning and drafting guidebooks. See, e.g. Scott J. Burnham, *The Contract Drafting Guidebook: A Guide To The Practical Application of The Principles of Contract Law* (3rd edn, 2003); Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2nd edn, 2004).

171. On judicial responses to these practices, see, e.g. <http://www.gripe2ed.com/scoop/story/2004/12/20/8257/4850> (Accessed February 1, 2009).

172. On Apple's unilateral ex post modification of the right of purchasers to burn music on i-Tunes from ten to seven play-lists, see Apple Computer Australia Pty Ltd, "iTunes Store—Terms of Service" at cl.20, available at <http://www.apple.com/legal/itunes/au/terms.html#SERVICE> (Accessed February 1, 2009). See too Jason Schultz, "Meet The New iTunes, Less than the Old iTunes?" available at http://lawgeek.typepad.com/lawgeek/2004/04/meet_the_new_it.html (Accessed February 1, 2009).

173. On scepticism whether ex post modification of conditions in sales contracts by suppliers under Art.2 of the UCC are valid in the absence of the purchasers' express consent, see Richard E. Speidel, above, fn.66.

174. For a critical analysis of the use of contracts to protect intellectual property, notably trade secrets, see Sharon K. Sandeen, "Limitations Grounded in Property Law: A Contract by Any Other Name is Still a Contract: Examining the Effectiveness of Trade Secret Clauses to Protect Databases", 45 Idea 119 (2005).

175. For discussion on such after-the-fact "acceptance", see, e.g. Mark Andrew Cerny, Note, "A Shield Against Arbitration: U.C.C. Section 2-207's Role in the Enforceability of Arbitration Agreements Included with Delivery of Products", 51 ALA. L. Rev. 821 (2000).

176. On the limits of such copyright protection, see Pamela Samuelson, "Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium", 87 Cal. L. Rev. 1 (1999).

177. See above fn.104. For the argument that Judge Easterbrook over-extended that protection in *Pro-CD v. Zeidenberg*, see above, "Some tentative conclusions". For comparable issues arising in product liability cases, see Epstein, above fn.73; Priest, above fn.73; Schwartz, "Proposals for Products Liability Reform", above fn.73.

178. 140 Wn.2d 568, 998 P.2d 305 (Wash. Sup. Ct. 2000).

179. Typifying an invasive ex post licensing arrangement imposed on consumers is Microsoft's past practice of imposing security patches that make changes to computer operating systems, affecting computer speed and performance, without prior notice to or consent of consumers. See, e.g. Microsoft Security Bulletin MS02-032: 26 June 2002 Cumulative Patch for Windows Media Player (Q320920) <http://www.microsoft.com/technet/security/bulletin/MS02-032.msp> (Accessed February 1, 2009).

180. See M.A. Lemley, "Terms of Use", 91 Minn. L. Rev. 459, 468–69 (2006).

181. There is no shortage of critical reflection on EULA. The Electronic Frontier Foundation refers to EULAs as "dangerous terms." See Annalee Newitz, "Dangerous Terms: A User's Guide to EULAs", at <http://www.eff.org/wp/eula.php> (Accessed February 1, 2009). See too US-CERT, "Reviewing End User Licensing Agreements", available at <http://www.us-cert.gov/cas/tips/ST05-005.html> (Accessed February 1, 2009).

182. On this view see Robert A. Hillman, "Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?" 104 Mich. L. Rev. 837 (2006).

183. This conception of "the law in action" is an underlying theme in the jurisprudence of Karl Llewellyn, the primary drafter of Art.2 of the UCC. See, e.g. Karl L.Llewellyn, "Some Realism about Realism—Responding to Dean Pound", 44 Harv. L. Rev.1222 (1931).

184. On EULA of famous brand names available on the internet, see, e.g. Microsoft's practice at <http://www.microsoft.com/windowsxp/home/eula.msp> [Microsoft Windows XP] (Accessed February 1, 2009); <http://www.microsoft.com/about/legal/useterms/> [Microsoft, contracts generally] (Accessed February 1, 2009); <http://www.adobe.com/products/eulas/> [Adobe] (Accessed February 1, 2009); <http://www.skype.com/company/legal/eula/> [Skype] (Accessed February 1, 2009).



185. On how to make EULA's more user friendly, see Robert W. Gomulkiewicz, "Getting Serious About User-Friendly Mass Market Licensing For Software", 12 Geo. Mason L. Rev. 687 (2004).
186. On such issues in product liability cases, see Epstein, above fn.73; Priest, above fn.73.
187. On a test for substantive unconscionability, see *Discover Bank v Sup. Ct. of Los Angeles*, 36 Cal. 4th 148 (2005).
188. See generally, e.g. Arthur Allen Leff, "Unconscionability and the Code. The Emperor's New Clause", above fn.10. See too Robert A. Hillman, "Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302", 67 Cornell L. Rev. 1 (1981).
189. *Gatton v T-Mobile USA Inc*, 152 Cal. App. 4th 571 (2007).
190. In the court's view: "To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree, rather, the analysis employs a sliding scale in that the more substantively oppressive the contract term the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." 152 Cal.App. 4th 571 (2007), Westlaw, para.3.
191. See *Gatton v T-Mobile*, at 571.
192. "Absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives." 152 Cal.App.4th 571(2007), Westlaw, para.13.
193. It is doubtful that T-Mobile adequately explained the legal significance of these conditions to its customers, nor if it did, whether its customers reasonably understood its explanations. *Gatton v T-Mobile* at 571. Providing an accurate legal explanation to customers would have been both time-consuming and might have discouraged customers from purchasing.
194. *Gatton v T-Mobile*, Westlaw, para.13.
195. For discussion whether binding arbitration is more efficient than trial by jury, given the expertise of arbitrators, and the cost and time of litigation, see, e.g. Stephen J. Ware, "Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights", 67 Law & Contemp. Prob. 167 (2004); Jeffrey. W. Stempel, "Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism", 19 Ohio St. J. Dispute Res. 757 (2004).
196. On mandatory arbitration in contract, see, e.g. Charles L. Knapp, "Taking Contracts Private: The Quiet Revolution in Contract Law", 71 Fordham L. Rev. 761 (2002); Symposium, "Mandatory Arbitration", 67 Law & Contemp. Probs. 1 (2004). On the constitutionality of binding arbitration that purports to exclude resort to courts and jury trials, see Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns", 72 Tul. L. Rev. 1, 1 (1997). See too John P. Tomaszewski, "The Enforceability of Adhesive Arbitration Clauses in International Software Licenses", 43 J. Tech. L. & Policy (1997), also at <http://grove.ufl.edu/techlaw/vol3/issue1/tomaszewski.html> (Accessed February 1, 2009).
197. *Gatton v T-Mobile*, above fn.190, Westlaw, para.5 (2007).
198. *Gatton v T-Mobile*, Westlaw, para.5. See too Jean R. Sternlight, "Rethinking", above fn.197 at 1 (1997) (arguing that many arbitration agreements "unconstitutionally deprive [federal court litigants] of their right to a jury trial").
199. On a Washington State Supreme Court decision holding that the waiver of a class action in an arbitration clause in a cellular service contract was substantively unconscionable, see *Scott v Cingular Wireless*, 161 P.3d 1000 (2007). However, in earlier cases, both 4th and 11th Circuit Courts dismissed arguments that arbitration clauses precluding class actions are unconscionable. See *Snowden v Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Jenkins v First Am. Cash Advance of Georgia*, 400 F.3d 868(11th Cir. 2005). For a decision by the 9th Circuit Court of Appeals, overturning an arbitration clause waiving in a New Cingular Wireless contract as unconscionable under California law and rejecting that the Federal Arbitration Act preempts state law, see *Shroyer v New Cingular Wireless*, No. 06-55964.
200. On the finding of procedural unconscionability when a superior bargaining party fails to provide advance notice of its exercise of its superior power, see 9th Circuit Court of Appeals in *Douglas v U.S. District Court (Talk America)*, No. 06-75424 (9th Cir. July 18, 2007). (Online service provider could not bind customers to modified contract terms posted on its website unless it provided customers with advance notification of those modified terms).
201. Provocatively phrased, "the theory of the shrink-wrap license... [is] that the user manifests assent to terms by engaging in a particular course of conduct that the license specifies constitutes acceptance." See M.A. Lemley, above fn.181 at 467.
202. On such differences, compare, e.g. *America Online, Inc, v Booker*, 781 So. 2d 423 (Fla. Dist. App. 2001) (holding that AOL's click-wrap forum selection clause is enforceable) with *Williams v America Online, Inc*, 2001 Mass. Super. LEXIS 11, 43 U.C.C. Rep. Serv. 2d (Callaghan) 1101 (Mass. Super. Ct. February 8, 2001) (holding that AOL's click-wrap forum selection clause is unenforceable).
203. 218 F. Supp. 2d 1165 (N.D. Cal. 2002).
204. A browse-wrap contract is distinguishable from a click-wrap contract in that, in the former, the terms of the agreements do not appear on the screen and the user is not compelled to accept or reject the terms before being able to proceed further. The browse-wrap agreement appears as a hyperlink to which the user gains access by clicking on the link which is an option, but not required. See further above fn.5 and 18. See too Kaustuv M. Das, "Forum-Selection Clauses in Consumer Click-wrap and Browse-wrap Agreements and the 'Reasonably Communicated' Test", 77 Wash. L. Rev. 481, 500 (2002).
205. *Comb v PayPal, Inc.*, at 1173. Procedural unconscionability refers to the procedures governing the formation of the contract, including the respects in which mutual assent may be absent or imperfect. Substantive unconscionability refers to the unfairness or unreasonableness of the terms. See further Richard A. Epstein, "Unconscionability: A Critical Reappraisal", 18 J.L. & Econ. 293 (1975); Alan Schwartz, "A Reexamination of Nonsubstantive Unconscionability", 63 Va. L. Rev. 1053, 1054 (1977).



206. *Comb v. PayPal*, above fn.203, at 1165. While not the basis of the decision, arbitration clauses sometimes are not contained in supply contracts, but imposed upon purchasers after the fact. See, e.g. *Manning v Paypal Inc* 2001 U.S. Dist. LEXIS 23410.

207. *Comb*, above fn.203. Like *Comb*, *Caspi v Microsoft LLC*, 323 N.J.Super.118, 732 A.2d 528 (N.J. App. Div. 1999) involved a disputed membership agreement including a forum selection clause that provided for both jurisdiction and venue in Microsoft's backyard, King County, Washington. Unlike *Comb*, the court in *Caspi* enforced the online subscription agreement. It held, inter alia, that Microsoft had not abused a position of market dominance; the disputed click-wrap agreement was not contrary to public policy; and plaintiffs had sufficient notice of the "I agree/do not agree" click option because they could scroll through the contract before accepting its terms.

208. *Comb* at 1174-75. For the argument that the choice of "backyard" arbitration by suppliers is usually convenient for both parties, and not unfair, see Florencia Marotta-Wurgler, above fn.22.

209. *Comb* at 1172-73. On procedural or "non-substantive" unconscionability, see Alan Schwartz, "A Reexamination of Nonsubstantive Unconscionability", 63 Va. L. Rev. 1053 (1977).

210. *DeJohn v TV Corp Intern.*, 245 F. Supp. 2d 913 (C.D. Ill. 2003).

211. *Comb v PayPal*, above fn.203.

212. *DeJohn*, at Westlaw, para.3.

213. *DeJohn*, at Westlaw para.4.

214. *DeJohn*, at Westlaw, para.4.

215. On such imperfect or "unperfected" consent, see below, "Guidelines".

216. The exercise of market choice presupposes that other suppliers would have used different clauses. See further below, "Regulating transactions by contract".

217. For argument that consumer contracts, not limited to "wrap" contracts, often do not fit the normative model of a contract, see generally, Stewart Macaulay, "Freedom From Contract", above fn.83.

218. *DeJohn* is perhaps not a "pure" browse-wrap contract. Users were provided with a hyperlink to the contractual conditions, but the link was included directly above the dialogue box in which they were asked to "click" their assent.

219. Differences between click-wrap and browse-wrap contracts include, among others: users in click-wrap agreements have constructive notice of "wrap" conditions which they receive prior to contracting, whereas users in browse-wrap contracts receive notice only after clicking on a hyperlink; users in click-wrap agreements cannot access products or services without clicking a button, whereas users in browse-wrap contracts can access products or services without ever accessing the conditions through the hyperlink; And browse wrap users may be unaware that they are concluding a conditional contract, whereas click wrap users are more likely aware that they are doing so. See further Das, above fn.167; and Kunkel above fn.18.

220. 306 F.3d 17 (2d Cir. 2002). *Specht* dealt with a Netscape license agreement that appeared on downloading and browsing through "Smart Download" software on its website that enhances the downloading files from the Internet. Concentrating on procedural unconscionability, the court held that an arbitration clause was enforceability under California law because Internet users could access and download the Netscape program without actually seeing the licensing agreement in advance (at 595).

221. Netscape's site did not require that users click the browse-wrap link. It stated: "Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software."

222. *Specht* at 595. The court added: "that affirmative action is equivalent to an express declaration stating, 'I assent to the terms and conditions of the license agreement' or something similar." (At 595.)

223. *Specht* at 595.

224. *Specht* at 595.

225. On advice to defendants as to how to render click-wrap contracts enforceable, see Martin Samson, "Click-wrap Agreements Held Enforceable", available at http://www.internetlibrary.com/publications/cwahe_art.cfm (Accessed February 1, 2009).

226. In *Gatton* the court declared a backyard forum selection clause unenforceable. Cf. *Caspi v Microsoft Network LLC*, 323 N.J. Super.118; 732 A.2d 528 (N.J. App. Div. 1999); *Caspi* involved a click-wrap contract in which the plaintiffs subscribed to Microsoft's MSN online network. The terms of the MSN membership agreement were contained in a scrollable window including a prompt at which the purchase could click indicating: "I agree" or "I don't agree" in which case the online registration process aborted. Plaintiff alleged that Microsoft engaged in "unilateral negative option billing" by rolling subscribers into more expensive plans without their advance assent. The Court enforced the forum selection clause, holding: (1) there was no fraud or exercise of dominant bargaining power by Microsoft, (2) the disputed clause did not violate public policy, (3) it did not seriously inconvenience the trial process and (4) MSN members had adequate notice of the clause because they were free to scroll through the computer screens displaying the terms for any amount of time before agreeing to it. Cf. *Forrest v Verizon Communications, Inc*, 805 A.2d 1007 (D.C. 2002).

227. Arguably, *Caspi* below fn.232 is an illustration of purchase acceptance by acquiescence.

228. Typifying this division among courts are these remarks by an appellate court in Wisconsin: "[w]e are, however, persuaded by what appears to be a growing minority of courts that a waiver of class-wide relief is a significant factor in invalidating an arbitration provision as unconscionable." *Coady v Cross Country Bank*, 729 N.W.2d 732 (Wis. Ct. App. 2007).



229. 306 F.3d 17 (2d Cir. 2002); On *Specht*, see above fn.220.

230. 805 A.2d 1007 (D.C. 2002), On *Forrest*, see above fn.17.

231. See above fn.17, at 1010-11. Customers brought a class action on grounds of frequent and lengthy disruptions in the DSL service and slower service speeds than promised by Verizon. The DSL online service license contained a forum selection clause in a small computer window in which only a portion of the agreement was visible, and a scroll bar that allowed customer to scroll through the agreement. Below the scroll box was an "accept" button, which the customer could click to assent to the agreement. The court held that the forum selection was enforceable.

232. On an appellate court in New Jersey affirming the enforceability of a forum selection clause in a click-wrap licensing agreement, see *Caspi v Microsoft Network*, L.L.C., 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999), cert. denied, 162 N.J. 199, 743 A.2d 851 (1999). On forum selection clauses in click-wrap and browse-wrap agreements, see Kaustuv M. Das, above fn.204 at 500.

233. The pursuit of predictability, inherent in American legal realism, is reflected in Karl Llewellyn's conception of Art.2 of the UCC. See Llewellyn, above, fn.7. Applied to unconscionability, the goal is to be able to predict shifts in the judicial construction of procedural and substantive unconscionability in 21st century "wrap" contracts. See further below, "The art of distinction".

234. On the evolution of consumer protection including under Art.2 of the UCC, see Caroline Edwards, above, fn.12; Andrew J. Grotto, above, fn.76; Mark E. Budnitz, "Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?" 16 Ga. St. U. L. Rev. 741(2000).

235. For the view that decisions in most contract cases are predictable, see Robert Hillman, "The Crisis in Modern Contract Theory" 67 Tex. L. Rev. 103 (1988).

236. On limited success in having states adopt the UCITA, see below, "Code incursions".

237. It is probable, but not certain, that *Gatton* has signified a shift towards greater judicial scrutiny of "wrap" contracts in California. But cf. *Mandel v Household Bank*, 2003 WL 57282, at *4 (Cal. Ct. App. January 7, 2003) in which the California Court of Appeal affirmed that an arbitration clause barring a class arbitration action was unconscionable. On variations in the judicial treatment of conditions in "wrap" contracts in California, see above. "Finding distinctions".

238. *ProCD, Inc v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). See further above, "Some tentative conclusions".

239. On the enforceability of "wrap" contracts, see above, "Declaring click-wrap clauses enforceable".

240. For debate on the fairness of forum selection clauses in cases like *Brower v Gateway*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998), see above, "Consumers with market choice". For a discussion of the *DeJohn* case, see above, "Consumer-resellers". On courts declining to enforce forum selection clauses, see *Williams v America Online, Inc*, 2001 Mass. Super. LEXIS and *Comb v PayPal*, above fn.203.

241. 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998). On the expertise and efficiency of arbitration compared to litigation and juries in particular, see fnn.105, 105, 128 and 129.

242. On the "fact sceptics", see Jerome Frank, "Law and The Modern Mind" (1930), Chs 4-5. See too Felix S. Cohen, "Transcendental Nonsense and the Functional Approach", 35 Colum. L. Rev. 809 (1935).

243. *Hotmail Corp v Van\$ Money Pie*, 1998 U.S. Dist. LEXIS 10729; 47 U.S.P.Q.2D (BNA) 1020 (N.D. Cal. 1998) (No. C98-20064 JW) (not reported).

244. *Hotmail Corp v Van\$ Money Pie*, 1998 WL 388389, N.D. Cal. 1998, Westlaw, para.188.

245. *Hotmail Corp v Van\$ Money Pie*. The court also held that Hotmail would likely succeed in asserting defendants' false designation of origin and unfair competition: Westlaw, para.9

246. *Hotmail Corp. v Van\$ Money Pie*. On the Computer Fraud and Abuse Act, see 18 U.S.C., s.1030 at *6.63. See too *Hill v Gateway 2000, Inc.*, 105 F. 3d 1147 (7th Cir. 1997) (court upheld a 30 day box-wrap agreement).

247. See, e.g. Christopher Engel, "The Role of Law in the Governance of the Internet", 20 Int'l. Rev. Law, Computers & Technology 201 (2006); R.K. Zimmerman, 4 N.Y.U.J. Legisl. & Public Policy 438 (2001). A further issue is the extent to which corporations can and should self-regulate the use of spam within a democracy. See e.g. Christine Parker, *The Open Corporation: Effective Self-Regulation And Democracy* (Cambridge University Press, 2002)

248. See, e.g. *Gatton v T-Mobile USA, Inc*, 152 Cal.App.4th 571, where the court stated: "we conclude that courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market." (at 355-56). See too, Evangelos Moustakas, C. Ranganathan and Penny DuQuennoy, "Combating Spam Through Legislation: A Comparative Analysis of US And European Approaches", in Proceedings of Second Conference on Email and Anti-Spam, 2005, available at <http://ceas.cc/papers-2005/146.pdf> (Accessed February 1, 2009).

249. On the influence of such public policy considerations, see *Hotmail Corp v Van\$ Money Pie*, above fn.244.

250. On recent decisions permitting the blocking of spam, see *ZANGO, INC, Plaintiff v Kaspersky Lab. Inc*, Case No. C07-0807-JCC.; also cited at <http://claranet.scu.edu/tempfiles/tmp32483/zangokasperskyTROdenial.pdf> (Accessed February 1, 2009); *e360 Insight LLC v The Spamhaus Project*, Case No 06 C 3958, August 23, 2006, also available at <http://www.spamsuite.com/node?page=26> (Accessed February 1, 2009). See too <http://blog.wired.com/27bstroke6/files/spamhaus.pdf> (Accessed February 1, 2009).

251. At a superficial level, Judge Easterbrook's decision in *ProCD v Zeidenberg* emphasises the paramount importance of mutual assent. See below, "Perfecting assent".



252. So too, courts may diverge over the transaction costs associated with applying public policy in specific cases. See, e.g. *Santa Fe Natural Tobacco Co, Inc v Spitzer*, 2001 WL 636441 (S.D.N.Y. June 8, 2001) (No. 00 CIV. 7274(LAP); 00 CIV. 7750(LAP)). The court held that "[b]ecause of the widespread parental supervision of children's Internet activities and the availability of various technological tools to assist this supervision, the need to obtain unsupervised, Internet access is a significant transaction cost to minors attempting to purchase cigarettes over the Internet." (at 20). The court ultimately decided that the state had "failed to demonstrate that the statute will affect any material local benefit in reducing direct sales of cigarettes to minors." See too *Swedenburg v Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y., September 5, 2000) (No. 00-CV-778).

253. UCITA was previously UCC draft article 2 B-207 and 208. See further above fn.112.

254. UCITA, s.112 deals with "manifesting assent to a record or term" by a person or electronic agent "acting with knowledge of, or after having an opportunity to review it." Conduct or operations manifesting assent "may be proved in any manner" including obtaining and using the information or by reaffirming their assent by subsequent conduct. Sub-section (f) stipulates that providers of online services, network access, and telecommunications services "do not manifest assent to a contractual relationship simply by their provision of those services to other parties ...at the request or initiation of a person other than the service provider."

255. See further Garry L. Founds, below fn.260.

256. See <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.htm> (Accessed February 1, 2009).

257. On Maryland's option of UCITA in full, see 2000 Md. Laws ch.11 (H.B. 19), amending Md. Coml. Sec. 13-101.1. On UCITA's adoption in Virginia, see Carlyle C. Ring, Jr, "An Overview of the Virginia UNITA" 8(1) *Richmond Journal of Law & Techonolgy* (Fall 2001).

258. http://www.nccusl.org/nccusl/ucita/UCITA_Standby_Comm.htm (Accessed February 1, 2009).

259. On August 1, 2003, at its 112th Annual Meeting in Washington, DC, NCCUSL discharged the standby committee of the Uniform Computer Information Transactions Act. The discharge was approved by NCCUSL's Executive Committee on July 31, 2003.

260. For commentary on the UNITA See, e.g. Garry L. Founds, "Shrink-wrap and Click-wrap Agreements: 2B or Not 2B", 52 Fed. Communications Law J. (1999), also available at <http://www.questia.com/googleScholar.qst?docId=5001849948> (Accessed February 1, 2009).

261. See Leon E. Trakman, "Contracts: Legal", in 3(8) *International Encyclopedia of The Social and Behavioral Sciences* (2001), p.102. See too above, "Introduction".

262. See, e.g. Margaret Jane Radin, "Contract Formation - Assent: Humans, Computers, and Binding Commitment", 75 Ind.L.J.1125 (2000). Radin distinguishes the "contract-as-consent" model which "involves the meeting of the minds between two humans" from the "contract-as-product" model. She argues for technical standardisation in the "contract-as-product" model through authoritative technical bodies, such as the Institute of Electrical and Electronic Engineers, through the legislature, or through industry-agreed standardisation. See too Radin, "Boilerplate Today", above fn.26.

263. If a separate contract is in issue, such as under UCC § 2:207, then further mutual assent is needed to conditions contained in the second offer, such as relating to the use of the product. See further below fn.150.

264. On the interface between the formation of "wrap" contracts and their status as contracts-as-products, see above, "Perfecting incomplete contracts" at p.176.

265. Contracts that are inchoate and unperfected are sometimes conceived of as "incomplete". See Jean Tirole, "Incomplete Contracts: Where Do We Stand?" 67 *Econometrica* 741(1999); Gillian K. Hadfield, "Judicial Competence and the Interpretation of Incomplete Contracts", 23 J. Leg. Stud.159 (1994). But see Omri Ben-Shaha, "Agreeing to Disagree: Filling Gaps in Deliberately Incomplete Contracts", 2004 Wisc. L. Rev. 389, also available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1031&context=alea> (Accessed February 1, 2009).

266. An absence of *consensus ad idem* arises in common mistake cases in which parties have different understandings of the material facts. See A. W. Brian Simpson, *Leading Cases In The Common Law* (1995), Ch.6; *Colfax Envelope Corp v Local No. 458-3M, Chicago Graphic Communications International Union, AFL-CIO*, 20 F.3d 750, 753 (7th Cir. 1994); *Raffles v Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

267. Should an end-user in a shrink-wrap or browse-wrap "contract" be deemed to assent to conditions which were not included in the contract at the time of acceptance? The answer depends on whether courts are willing to infer ex post facto assent by implication of fact or law. See further Lemley, below fn.181 at 469; Michael Madison, "Legal Ware: Contract and Copyright in the Digital Age", *Fordham L.Rev.* 1025, 1049-54 (1998); Apik Minassian, "The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements", 45 *UCLA L. Rev.* 569, 583-6 (1997).

268. On mutual assent in contract, see Trakman, above fn.261. See too F. D. Rose, "Consensus ad idem: Essays in Honour of Guenter Treitel", 56 *Camb. L. J.* 231 (1997); Ian R. MacNeil, "Restatement (Second) of Contracts and Presentation", 60 *Va. L. Rev.* 589 (1974).

269. On the duty to perform in good faith, see below fn.290. On judicial gap filling and implied terms, see Richard A. Posner, "The Law and Economics of Contract Interpretation", above fn.38 at 8-11; George M. Cohen, "Implied Terms and Interpretation in Contract Law", in Boudewijn Bouckaert and Gerrit De Greef (eds.), *Encyclopedia of Law & Economics*, (2000), Vol.3, p.78; Leon E. Trakman, "Legal Fictions and Frustrated Contracts", 46 *Modern L. Rev.* 39 (1983).

270. On the contra proferentem rule, see above fn.38.

271. On § 2-302 in the UCC, see above fn.12.

272. See above, "Assent in principle". See too Alan Schwartz and Robert E. Scott, "Contract Theory and the Limits of Contract Law", 113 *Yale L.J.* 541 (2003).



273. Construing contracts in favour of weaker bargaining parties is implicit in the construction of adhesion contracts, even if those contracts are not unconscionable. See above, "The adhesion contract".

274. See, e.g. *Gatton v T-Mobile*, above, fn.189, discussed above at "Enter The Dragon: End Users' Licence Agreement".

275. See, e.g. "Even if instant agreement is procedurally unconscionable, it may nonetheless be enforceable if the substantive terms are reasonable", in *Comb v PayPal, Inc* 218 F.Supp.2d 1165, 1173 N.D.Cal., 2002.

276. On filling gaps in incomplete contracts, see Omri Ben-Sharar, "Agreeing to Disagree: Filling Gaps in Deliberately Incomplete Contracts", 2004 Wisc. L. Rev. 389; Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", 99 Yale L. J. 87 (1989).

277. Such constructive notice might also arise when the purchaser is given the opportunity to read an online document, but fails to do so in signifying assent, in which case the notice may be actual or constructive depending on the circumstances. See, e.g. *Groff v America Online, Inc*, 1998 R.I., Super. Ct., LEXIS 46 (Super. Ct. R. I. Providence May 27, 1998) (C.A. No. PC 97-0331) at *13 (Plaintiff in a click-wrap contract was invited to read the contract not just once, but twice).

278. Such ambiguity might arise, for example, when a court determines that the purchase has had a reasonable period in which to return a good and voice the contract. See too Gertner, above fn.231.

279. On the efficiency of judicial gap filling, see above fn.266.

280. On the reluctance of courts to imply price and quantity terms into contracts, see *Tranzact Technologies, Ltd. v Evergreen Partners, Ltd.*, 366 F.3d 542, 546 (7th Cir. 2004); *Cloud Corp v Hasbro, Inc*, 314 F.3d 289, 292 (7th Cir. 2002); *Echols v Pelullo*, 377 F.3d 272, 276 (3d Cir. 2004); *Interstate Litho Corp v Brown*, 255 F.3d 19, 27 (1st Cir. 2001). On court's resolving ambiguities in mass consumer contracts, see above, "The art of distinction" and fn.225.

281. Judges usually find the meaning in the "plain words" of the contract. But see Avery Wiener Katz, "Contractual Incompleteness: A Transactional Perspective", 56 Case W. Res. L. Rev 169 (2005); Eric A. Posner, "The Parol Evidence Rule", above fn.93 at 533; Mark K. Glasser and Keith A. Rowley, "On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation", 49 Baylor L. Rev. 657 (1997).

282. See above, "Declaring click-wrap clauses enforceable".

283. On the conception of middle ground in which the winner takes some, see Leon E. Trakman, "Winner Take Some", above fn.92.

284. For argument that courts do not "make" contracts, or unmake them generally, see W. Friedman, "Changing Functions of Contract in the Common Law", 9 Toronto L.J.15 (1951); Christine Jolls, "Contracts as Bilateral Commitments: A New Perspective on Contract Modification", 26 J. Leg. Stud. 203 (1977).

285. On interpreting contracts on non-consensual bases, notably on economic grounds, see Steven Shavell, "On the Writing and the Interpretation of Contracts", 22 J. Law Econ. & Org., 289 (2006); Richard Posner, "The Law and Economics of Contract Interpretation", American Law and Economic Association Annual Meetings, paper 56 (2005), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1527&context=alea> (Accessed February 1, 2009); ; Avery Wiener Katz, "The Economics of Form and Substance in Contract Interpretation", 104 Colum. L. Rev. 496 (2004); Pierpaolo Battigalli and Giovanni Maggi, "Rigidity, Discretion, and the Costs of Writing Contracts", 92 Am. Econ. Rev.798 (2002); David Charny, "Hypothetical Bargains: The Normative Structure of Contract Interpretation", 89 Mich. L. Rev. 1915 (1991); Leon E. Trakman, "Interpreting Contracts", above fn.38 at 241.

286. On the significance of extrinsic evidence in giving words their plain meaning in a contract, see John Henry Wigmore, *A Treatise On The Anglo-American System Of Evidence In Trials At Common Law*, (3rd edn), (1940), Vol. 9, § 2470, pp.223-228.

287. On courts "making contracts" such as by resort to parol evidence, see, e.g. Richard Posner, above fn.35 at 533; Glasser and Rowley, above fn.235.

288. Reliance on party practice and trade usage is a "more direct" way of resolving ambiguities in contracts than by constructing unconscionability. Courts are less inclined to fill gaps in contracts by applying § 2-302(1) of the UCC. See above fn.225 and "Declaring click-wrap clauses enforceable".

289. The conception of "best efforts" well precedes both electronic commerce and the UCC and is attributed to Justice Benjamin Cardozo in *Wood v Lucy, Lady Duff Gordon*, 222 N.Y. 88 (1917). See too E. Allan Farnsworth, "On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law", 46 U. Pitt. L. Rev. 1, 44 (1984); Summers, "The General Duty of Good Faith - Its Recognition and Conceptualization", 67 Cornell L. Rev. 810 (1982); Steven Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", 94 Harv. L. Rev. 369, 372-73 (1980); Steven Burton, "Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code", 67 Iowa L. Rev. 1 (1981); Robert S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code", 54 Va.L.Rev.195 (1968); E. Allan Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code", 30 Chi. L. Rev. 666, 679 (1963). See too Robert Dugan, below fn.304 at 5-7.

290. On these good faith performance duties under the UCC and Restatement, see above fn.290 and below fn.297.

291. For a classical illustration of how lawyers in Wisconsin resort to consumer protection laws in contracts, see Stewart Macaulay, "Lawyers and Consumer Protection Laws", 14 L & Soc. Rev. 115 (1979).

292. On the distinction between long-term relational contracts and short-term discrete transactions, see Ian R. Macneil, "Contracting Worlds and Essential Contract Theory", 9 Soc. & Leg. Stud. 431 (2000); Ian R Macneil, "Relational Contract Theory: Challenges and Queries", 94 Nw. L. Rev.877 (2000); Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-Classical



and Relational Contract Law", 72 Nw. L. Rev. 854 (1978). But too Melvin Eisenberg, "Why There is No Law of Relational Contracts", 84 Nw. L. Rev. 805 (2000); Paul J. Gudel, "Relational Contract Theory and the Concept of Exchange", 46 Buff. L. Rev. 763 (1998).

293. Courts that supply "reasonable" terms in commercial transactions will usually provide a reasonable price or quantity of goods to be delivered. Of note, § 2-305 of the UCC provides that courts can imply terms in contracts of sale, such as by establishing a reasonable market price. See further *Lickley v Max Herbold, Inc.*, 984 P.2d 697 (Idaho 1999); *Koch Hydrocarbon Co v MDU Resources Group*, 988 F.2d 1529, 1534 (8th Cir. 1993). The logic behind implying reasonable terms applies equally to terms other than price and quantity, including special conditions governing performance and the resolution of disputes.

294. On arbitration clauses in securities contracts to which investors or employees do not really "consent", see Sung J. Lim, "Mandatory Arbitration in the Securities Industry: Efficiency at the Cost of Justice for All?", 26 J. Corp. L. 771 (2001); Cheryl Nichols, "Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias", 15 Ohio St. J. On Disp. Resol. 63 (1999); Marc I. Steinberg, "Securities Arbitration: Better for Investors than the Courts?", 62 Brook. L. Rev. 1503, 1531 (1996); Richard E. Speidel, "Contract Theory and Securities Arbitration: Whither Consent?" 62 Brook. L. Rev. 1335 (1996).

295. On a critical view of "terms later" conditions that impose performance duties on purchasers after the contract has been concluded, notably in response to Judge Easterbrook's decision in *ProCD v Zeidenberg*, see Roger C. Bern, "'Terms Later' Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding", 12 J.L. & Pol'y 641 (2004).

296. See Art.1-203 of the UCC: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 205 of the Restatement which post-dated and was influenced by the UCC, stipulates: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

297. See *Tymshare v Covell*, 727 F.2d 1145 (D.C. Cir. 1984) (per Scalia prior to his appointment to the Supreme Court; also citing E. Allan Farnsworth on good faith performance). See too *Best v United States National Bank*, 739 P.2d 554 (Or. 1987); *Restatement, Second, of Contracts* § 205, Comment d.

298. On courts managing continuing relationships between suppliers and purchasers or end users in general, see below, "Perfecting incomplete contracts".

299. Suppliers do not have a legal duty to "negotiate" in good faith, only to so perform under the UCC and Restatement. See, e.g. above fnn.290 and 297.

300. On admitting extrinsic evidence on related "wrap" transactions grounded in the supplier's course of dealings, similarity of conditions, and public policy, see text immediate below and below, "Guidelines".

301. This is grounded in the principle that each party is bound to perform as agreed, *pacta sunt servanda*, agreements are binding. See Brian A. Blum, *Contracts: Examples & Explanations*, (4th edn), (Aspen, 2007), section 1.4.2.

302. This view is reflected in the contract-as-product conception of "wrap" contracts. See above, "Perfecting assent".

303. Courts cannot "directly" manage transactions between suppliers and non-parties to litigation. However, they can manage such transactions "indirectly." Such indirect management occurs when judges decide cases in light of "social fact evidence" based on the impact their decisions have upon other consumers in positions like plaintiff customers. On such sociological jurisprudence, see Roscoe Pound, *An Introduction to the Philosophy of Law* (1982); Roscoe Pound, "Liberty of Contract and Social Legislation", 17 Colum. L. Rev. 538 (1917).

304. On good faith performance under Art.2 of the UCC, see, e.g. Robert Dugan, "Good Faith and the Enforceability of Standardized Terms", 22 Wm. & Mary L. Rev. 1, 5-7 (1980). See too above fn.290.

305. On the quasi-public nature of adhesion contracts, see above, "The adhesion contract". For an analysis of on the communal character of contracts generally, see Daniel Markovits, "Contract and Collaboration", 113 Yale L. J. 1417 (2004).

306. Judicial gap-filling at its narrowest includes the discrete transaction between the parties and at its broadest the communal environment in which mass contracts are concluded. See further "Assent in principle".

307. On these all-or-nothing remedies, see, "Assent in principle" and "The perimeter of implied terms".

308. On challenges to the public-private dichotomy in contract law, see Clare Dalton, "Deconstruction of Contract Doctrine", 94 Yale L. J. 997 (1985); J. Feinman, "The Significance of Contract Theory", 58 Cinn. L. Rev. 1238 (1983); Duncan Kennedy, "Form and Substance in Private Law Adjudication", 89 Harv. L. Rev. 1685 (1976).

309. On the new formalism in contract law, see Symposium: "Formalism Revisited", 66 Chi. L. Rev. 527 (1999). But see, David V. Snyder, "Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct", 54 SMU L. Rev. 617 (2001).

310. Acting pragmatically, judges may find that the adjudicative facts are adequate to ground their decisions without having recourse to social fact evidence. Ideologically, they may avoid social fact analysis in the belief that social facts are better left to legislatures than courts or law. See further above fnn.247 and 261.

311. On the distinction between adjudicative and social fact evidence, see Laurens Walker & John Monahan, "Social Facts: Scientific Methodology as Legal Precedent", 76 Cal. L. Rev. 877 (1988); John Monahan and Laurens Walker, "Judicial Use of Social Science Research", 15 Law & Behavioral Science 580 (1991); Kenneth Culp Davis, "Facts in Lawmaking", 80 Colum. L. Rev. 931 (1980).

312. See, e.g. Richard Posner, "Contract Interpretation: The Law and Economics of Contract Interpretation" 83 Tex. L. Rev. 1581 (2005).

313. This is an age-old conflict between "positivist" judges who decide cases strictly "according to law" and "realist" and "social behavioral" judges who decide according to the interdisciplinary (and economic) context surrounding the law. For an erudite debate over the separation between law and morals, see H. L. A. Hart, "Positivism and the Separation of Law and Morals", 71 Harv. L. Rev. 593 (1959); Lon L. Fuller,



"Positivism and Fidelity to Law: A Reply to Professor Hart", 71 Harv.L. Rev. 630 (1958). See generally, Denis Galligan, *Law in Modern Society* (2007); Brian Leiter, "Legal Realism and Legal Positivism Reconsidered", 111 Ethics, 278 (2001); Wilfred J. Waluchow, *Inclusive Legal Positivism* (1994); Roger Cotterell, *The Sociology of Law* (1992); Wolfgang Gaston Friedmann, *Legal Theory* (1967).

314. On this rejection of legal realism by new formalists, see esp. Lisa Bernstein, "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms", 144 Pa. L. Rev. 1765 (1996). For a discussion of the tension between the new formalists and American Legal Realism in the sale of goods, see Clayton P. Gillette, "The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG" (Working Paper No. 04-005, N.Y.U. Law and Economics Research Paper Series, January 2004).

315. But see Kevin E. Davis, "The Role of Nonprofits in the Production of Boilerplate", 104 Mich. L. Rev. 1075 (2006). Davis raises the specter of governmental agencies assisting in contract drafting, not directly, but by encouraging nonprofits such as trade associations to do so.

316. On judicial reliance to fill gaps in contracts, see above fnn.236 and 237.

317. "Assent in principle" and "Perfecting incomplete contracts" above, challenge this all-or-nothing enforcement/no-enforcement result. Judges have an alternative legal basis upon which to frame the supplier's performance duties other than according to the plain words of the contract-as-product, such as under § 2-302(1) of the UCC.

318. On such "plain word meaning" interpretation, see above fnn.94 and 282. Courts may resist a "plain word" interpretation, for example, by declaring the contract unenforceable because the price is uncertain, even though one party has performed in good faith, but by permitting a restitution claim for the market value of performance. In effect, the court constructs an alternative price to the contract price based on market value. See *Farash v Sykes Datatronics, Inc.*, 452 N.E.2d 1245, 1248, N.Y.1983).

319. See, e.g. Ronald J. Mann, "Contracting for Credit", 104 Mich. L. Rev. 899, 922-24 (2006).

320. See Davis, above fn.49, at 1099; Stephen J. Choi and G. Mitu Gulati, "Contract as Statute?" 104 Mich. L. Rev. 1129, 1139-41 (2006); Baird, above fn.141 at 941-42.

321. On the statutory regulation of the internet, see, e.g. Ang Peng Hwa, *Ordering Chaos: Regulating the Internet* (Singapore: Thomson Learning, 2005).

322. For a classical representation of the regulatory function of law on contract and property, see John Henry Wigmore, "Problems of the Law's Mechanism in America" 4 Va. L. Rev. 337 (1917).

323. On these expectations of courts, see "Jurisprudential developments" below.

324. State intervention is most notably in regard to gambling, the sale of alcohol and drugs. See, e.g. *Swedenburg v Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y., September 5, 2000) (No. 00-CV-778); *People of New York v World Interactive Gaming Corp.*, 185 Misc. 2d 852, 714 N.Y.S.2d 844 N.Y. County Sup. Ct. 1999), available at <http://www.tomwbell.com/NetLaw/Ch10/NYvWIGC1.html> (Accessed February 1, 2009); "Appendix G—Internet Sale of Alcohol, President's Working Group on Unlawful Conduct on the Internet", in *The Electronic Frontier: the Challenge of Unlawful Conduct Involving the Use of the Internet* (March 9, 2000), available at <http://www.tomwbell.com/NetLaw/Ch10/NetBooze.html> (Accessed February 1, 2009); "Appendix F - Internet Gambling", from *President's Working Group on Unlawful Conduct on the Internet, The Electronic Frontier: the Challenge of Unlawful Conduct Involving the Use of the Internet* (March 9, 2000), available at <http://www.tomwbell.com/NetLaw/Ch10/NetBets.html> (Accessed February 1, 2009); both Appendix F and Appendix G are also available at <http://www.usdoj.gov/criminal/cybercrime/append.htm> (Accessed February 1, 2009).

325. On these mixed messages in consumer protection legislation, see, e.g. David A. Hyman, "Drive-Through Deliveries: Is 'Consumer Protection' Just What the Doctor Ordered?" 78 N. C. L. Rev. 5 (1999). But see Gillian K. Hadfield, Robert Howse and Michael J. Trebilcock, "Information-Based Principles for Rethinking Consumer Protection Policy", 21 J. Consumer Policy 131 (1998).

326. On the history of UCITA, see above, "Code incursions".

327. The UCITA provides parties with illustrations of steps to be taken in order to arrive at mutual assent primarily in click-wrap contracts. See http://www.law.uh.edu/ucc2b/UCITA_final_02.pdf (Accessed February 1, 2009).

328. On cases in jurisdictions that enforce click-wrap agreements, see *Koch v America Online*, 139 F. Supp. 2d 690 (D. Md. 2000)) and Florida (*America Online, Inc. v Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001)).

329. On differences in the judicial treatment of arbitration clauses in states like New York and California, see above fnn.93, 105, 106, 128, 129 and 160.

330. Such fluidity is evident across the law of unconscionability. See Eric A. Posner, "The Parol Evidence Rule", above fn.93 at 540 ("In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.")

331. The wider context surrounding the contract includes extrinsic evidence beyond the literal or "plain word" meaning of the contract. Such evidence is conceived of as "objective" which may nevertheless include the practices of one or both parties that is not explicated through the "plain word" meaning of the contract. See *Matthews v Sears Pension Plan*, 144 F.3d 461, 467 (7th Cir. 1998); *Cole Taylor Bank v Truck Insurance Exchange*, 51 F.3d 731, 737-738 (7th Cir.1995); *AM International, Inc v Graphic Management Associates, Inc.*, 44 F.3d 572 (7th Cir. 1995); *Kerin v United States Postal Service*, 116 F.3d 988, 992 n. 2 (2d Cir. 1997); *Duquesne Light Co v Westinghouse Electric Corp.*, 66 F.3d 604, 614 (3d Cir. 1995); *Carey Canada, Inc v Columbia Casualty Co.*, 940 F.2d 1548, 1557-1558 (D.C. Cir. 1991); *Mellon Bank, N.A. v Aetna Business Credit, Inc.*, 619 F.2d 1001, 1009-1013 (3rd Cir. 1980).

332. On the enforcement of a browse-wrap contract on grounds other than prior notice of the disputed conditions, see *Forrest v Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002), above fn.194. On the enforcement of a click-wrap contract on grounds that plaintiff received sufficient prior notice of the disputed conditions, see *Groff v America Online, Inc* above fn.277 and "Perfecting assent".



333. For discussion on *Zeidenberg*, see above, "Enter Judge Easterbrook".
334. See http://www.wired.com/politics/law/commentary/circuitcourt/2007/08/circuitcourt_0801?currentPage=all (Accessed February 1, 2009).
335. The company settled the suit and agreed not to enforce the anti-benchmarking condition and to pay a fine. A distinctive feature was that the plaintiff was the Attorney-General of New York, albeit acting in a public interest capacity, as distinct from a consumer. Nevertheless, commentators have treated this case as a victory against abusive click-wrap contracts. See further Jennifer Grannick, "Courts Turn Against Abusive Clickwrap Contracts", (Commentary), *WIRED*, available at http://www.wired.com/politics/law/commentary/circuitcourt/2007/08/circuitcourt_0801?currentPage=all (Accessed February 1, 2009).
336. See Rakoff, "Contracts of Adhesion", above fn.31, at 1197 (referring to the law of unconscionability as a "jumble of contradictions").
337. On reliance placed on trade usage in the formulation and interpretation of contracts, see Eyal Zamir, above fn.37.
338. See, e.g. Michael J. Bonell, "UNIDROIT Principles 2004", 9 Uniform L. Rev.5 (2004); 9 Berger, *The Creeping Codification of the Lex Mercatoria* (1999).
339. This entails courts interpreting contracts in light of principles of good faith, standards of reasonableness and practices of trade, as distinct from the "plain word meaning" of those contracts. See Eyal Zamir, "The Inverted Hierarchy of Contract Interpretation and Supplementation", Colum. L. Rev.1710 (1977).
340. On the significance given by courts to prior notice of conditions, see above "Assent in principle" and "Perfecting incomplete contracts".
341. On the requirement that suppliers draw customers' attention to conditions in "wrap" contracts, see, e.g. *Gatton v T. Mobile*, above fn.190 and discussed above in "Restricting EULAs and service contracts" at p.170.
342. On the "ticket" cases, see *Parker v The South Eastern Railway Co* (1877) 2 CPD 416.
343. See, e.g. Eric A. Posner, *Contract Law in the Welfare State*, above fn.37 at 283.
344. On allegedly distinctiveness features of 21st century consumers, see above, "The 21st century 'wrap' consumer".
345. For a study on the statistical chance of winning a domain name dispute, see Michael Geist, "Fundamentally Fair.Com: An Update on Bias Allegations and the ICANN UDRP", at <http://aix1.uottawa.ca/geist/fairupdate.pdf> (Accessed February 1, 2009). Geist's study reveals that Complainants (famous brand name owners) win 85 per cent of the time in single panel determinations, and 64.3 per cent of cases involving a three party panel. The study sampling ended in July 2001. See too <http://www.udrinfo.com/> (Accessed February 1, 2009); Milton Mueller, "Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy", 17 *Information Society* 151 (2001).
346. See generally Leon E. Trakman, "From the Medieval Law Merchant", above fn.62.
347. On WIPO, see <http://www.wipo.int/amc/en/domains/> (Accessed February 1, 2009).
348. Inferred here is that suppliers, by combining hard sell tactics, fine print clauses and the expectation that consumers will believe what they are told, consumers will "agree" to terms they might not have believed had they fully comprehended the significance of the special conditions. See generally, Saul M. Kassin, "Human Judges of Truth, Deception, and Credibility: Confident but Erroneous", 23 *Cardozo L. Rev.* 809, 809 (2002); Peter J. DePaulo et al., "The Accuracy-Confidence Correlation in the Detection of Deception", 1 *Personality & Social Psychol. Rev.* 346 (1997); Annette C. Baier, "Trust and Its Vulnerabilities", in Grethe B. Peterson (ed.), *13 Tanner Lectures on Human Values* (1992) pp.109, 112; Peter Vallentyne, "The Rationality of Keeping Agreements", in Peter Vallentyne (ed.), *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement* (1991), p.177; Arthur A. Leff, *Swindling and Selling* (1976), pp.84-87.
349. On the extent to which competitive awareness among mass suppliers leads suppliers to replicate each other's contract practices, including to the benefit of customers, see W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power", 84 *Harv. L. Rev.* 529, 529 (1971); Meyerson, "Efficient Consumer", above fn.43 at 605.
350. On the clash between consumer policy and competition policy from an economic perspective, see John Vickers, "Economics for Consumer Policy, Keynes Lecture in Economics", *The British Academic*, October 29, 2003, available at http://www.ofc.gov.uk/shared_ofc/speeches/spe0403.pdf (Accessed February 1, 2009).

